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IMPLEMENTATION OF THE PROGRAMME OF ACTION FOR THE SECOND DECADE TO COMBAT RACISM AND RACIAL DISCRIMINATION

Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples

Nuuk, Greenland, 24-28 September 1991

Addendum

Introductory statements and background papers of the Meeting of Experts

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Opening statement by the Representative of the United Nations, Under-Secretary-General for Human Rights

It is my pleasure to welcome you all to this United Nations meeting to review the experiences of countries in the operation of schemes of internal self-government for indigenous populations. I wish to express my gratitude to the Greenland Home Rule Government for providing a venue for the meeting and to the Government of Denmark for support and assistance in its organization. We all recognize the uniqueness of the occasion: it is the first United Nations meeting to take place in Greenland, one of the few such meetings to be held in the Arctic Circle, and, to my knowledge, is the only United Nations gathering to discuss exclusively the question of self-government and autonomy in the history of the Organization.

Let me point out at the outset that the Under-Secretary for Human Rights regrets not being able to attend personally this meeting owing to other commitments and has asked me to convey to you his best wishes for successful deliberations.

The meeting on internal self-government for indigenous peoples was authorized by the General Assembly in its resolution 42/47 of 30 November 1987 as part of the plan of activities for 1990 to 1993 being implemented during the Second Decade to Combat Racism and Racial Discrimination. The importance of such an expert meeting was also recognized by the Working Group on Indigenous Populations and the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 1990/27.

We are at a crucial moment in history. Peace has come to countries and regions which were locked for many years in apparently insoluble conflicts; international relations, once so obstructed by hostility and misunderstanding, are now being affected by a new sense of trust and cooperation; and human rights have perhaps never been so much discussed and promoted as standards by which we should live in the future as they are today. What 10 years ago might have seemed impossible in the areas of peace, democracy and human rights is now part of our everyday reality.

As you know, the human rights programme is based on the three pillars of legislation, implementation and information/education. They form a triangular relationship which is at the heart of the United Nations action for human rights. In this field we can point to many achievements: a comprehensive framework of international standards consisting of some 70 covenants, conventions and other instruments; a growing machinery of committees, special rapporteurs, and other procedures, to ensure implementation; a developing programme of information and education to promote a culture of human rights worldwide. These activities can now take place in a greatly improved international context, in a world where there is less confrontation and more cooperation in finding solutions. We can look forward to a period of full implementation of the rights which have been elaborated with so much care and wisdom.

I do not want to suggest by these opening remarks that the world has become a secure haven of plenty for all or that it is not still a dangerous and unpredictable place. I have no need to remind you of the economic and social deprivation in which so many live or of the continuing violence in certain parts of the world. In the human rights field we still have a long distance to travel before we achieve the noble aspirations set out for us in the Universal Declaration of Human Rights. The Greenlandic people are well aware of the problems faced by countless human beings and their concern to promote human rights and contribute to greater understanding among peoples is demonstrated by their generous hosting of this meeting here at Nuuk.

Certain difficulties and obstacles notwithstanding, I believe we can regard the present time as offering us an opportunity to make further progress in realizing some of the aims of the drafters of the Universal Declaration and the Charter of the United Nations. These may be uncertain times but they provide an occasion to consolidate and strengthen human rights and make them a reality for all peoples and individuals. It is precisely in such an atmosphere that we can hope for considerable benefits from the recently proposed World Conference on Human Rights, of which the first preparatory session took place a few days ago. The World Conference will be held in 1993 and we hope it will become a focus for imaginative new ideas on human rights which will shape our thinking and action in the coming years.

Let me now turn to the subject of this meeting: schemes of internal self-government for indigenous populations. I will speak frankly. With the exception of the International Labour Organisation, which adopted a convention dealing with tribal peoples in 1957, the international community for many years largely ignored the special situation of indigenous peoples. But some 10 years or more ago, a process was set in motion in the United Nations which put indigenous peoples, their problems and their hopes, onto the agenda.

You are familiar with the first step in this process: the preparation of the Study of the problem of discrimination against indigenous populations prepared by the Special Rapporteur, Mr. José Martinez Cobo, completed in 1984. Its numerous recommendations and suggestions still provide a useful basis for our work today. You are also well aware of the activities of the Working Group on Indigenous Populations, established in 1982, with the dual mandate of reviewing national developments and elaborating international standards. The Working Group has become the focal point in the United Nations system for indigneous peoples. Indeed it has become one of our largest human rights meetings and at its recent session, which took place in the last two weeks of July, there were nearly 500 registered participants.

After nearly a decade which has seen indigenous peoples coming together at the United Nations at Geneva to share their views and concerns, I think I can say there has been an explosion of interest among the international community. The International Labour Organisation answered the call for renewed action in this field by revising its convention on tribal peoples and adopting in 1989 the new Convention 169 on indigenous and tribal peoples. In the wider arena of the United Nations this interest and concern is symbolized by the decision of the General Assembly last year to proclaim 1993 the International Year for the World's Indigenous People. Already a number of

States are planning special events, and the international organizations, particularly those with operational programmes in indigenous areas, are considering ways in which they can enhance the involvement of indigenous peoples and address their needs more directly.

The wider recognition of the concerns of indigenous peoples in the United Nations system may be attributed in large part to the prominence given to this issue in the human rights field. I think credit is due to the various organs of human rights - the Commission and Sub-Commission, in particular - for acknowledging that indigenous peoples face serious and unique human rights problems and aspire to special protection of their human rights. Among the distinctive characteristics identified are the special relationship between indigenous peoples and the land and nature; the different methods of resource management; and, of especial note, the holistic value system which makes the economy activity, developments, social organization, culture and philosophy of indigenous peoples interlinked and inseparable. New thinking in the international community emphasizes the need of respect for nature and the environment, of sustainable development, and of a holistic approach to problem solving and these ideas reflect very closely the traditional cultures of many indigenous peoples. The United Nations is now recognizing the important place of indigenous peoples in the global family, not only in the human rights field but also in the areas of environment, development and culture.

The meeting which starts today is the second to take place on indigenous peoples. The first seminar focusing exclusively on indigenous peoples was held at Geneva in 1989. The Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States (a summary of which is available as an ad hoc publication of the Centre for Human Rights (HR/PUB/89/5)), like the Working Group itself, was marked by innovation since it was the first time an indigenous person was elected rapporteur of a United Nations meeting. Its report, with recommendations, was submitted to the Commission on Human Rights for its consideration and you may wish to follow that procedure with any report resulting from the meeting here at Nuuk.

The Working Group itself has also generated new projects and studies. Mention can be made of the study currently under preparation by the Special Rapporteur, Mr. Alfonso Martínez, on treaties, agreements and other constructive arrangements between indigenous peoples and States, and of the working paper prepared by the Chairperson/Rapporteur of the Working Group, Mrs. Erica-Irene A. Daes, on the ownership and control of the cultural property of indigenous peoples.

But the primary focus of the Working Group's activities is the preparation of a draft declaration on the rights of indigenous peoples. Here, if you will permit me, I will pay tribute to the dedicated work of the Chairperson/Rapporteur of the Working Group, Mrs. Erica-Irene A. Daes, who has guided the drafting exercise so skilfully and creatively in the last seven years. Considerable progress has thus already been made on the draft declaration and, at the latest session of the Working Group in July of this year, the preamble and 18 operative paragraphs were agreed upon at first reading and submitted to the Sub-Commission when it met in August.

One of the central issues in the elaboration of new standards to protect and promote the rights of indigenous peoples is that of autonomy or internal self-government. The Chairperson/Rapporteur of the Working Group has expressed the view on many occasions that the draft declaration will deal only with autonomous arrangements within States. But even with this qualification it is clear that there are many different points of view and the existing arrangements vary enormously from country to country. There is as yet no consensus on this important principle and, as we all agree, international human rights instruments can only be built on mutual understanding and respect, and consensus.

The present meeting on internal self-government of indigenous populations can contribute to our greater understanding of this principle. We are privileged to welcome experts from numerous Governments and indigenous peoples' organizations, distinguished resource persons from Greenland, Denmark, the Philippines and Costa Rica, as well as the representative of the International Labour Office and the Special Rapporteur on treaties and member of the Working Group, Mr. Alfonso Martínez.

In this informal, calm and propitious environment we hope that you can exchange views and make suggestions that might assist the United Nations in its standard-setting activities. You should keep in mind that United Nations standards aspire to the highest ideals in human and international relations.

Opening speech by the Premier of Greenland,
Lars Emil Johansen

It is a very important event for us in Greenland, that we are here today as hosts for the first United Nations meeting being held north of the Arctic Circle. And especially, we are pleased that this particular meeting, where the United Nations has summoned experts from all over the world to discuss self-government for indigenous peoples, is being held in our country, Kalaallit Nunaat, where home rule has now existed for 12 good years.

But first and foremost, it is a pleasure for us that the United Nations, by conducting the meeting here, not only places Greenland on the United Nations political world map, but does so in connection with the efforts to create just and dignified living conditions for the 300 million indigenous people who live on this globe. This gives us the opportunity to contribute, in a symbolical as well as in a practical way, to the efforts to allow these many peoples to take their rightful position in the new world order.

Owing to the dramatic changes on the world scene within the last years, the United Nations has regained the unifying and peacekeeping role which was the very principle behind the Organization. In the various speeches concerning the new world order there is no doubt that the United Nations, specifically, is intended to have the role as the central body defining the guidelines and the rules for the new world order.

With the liberation of Kuwait, with the newly freed republic's admission to the United Nations, with the central role the United Nations has played in the hostage negotiations, with the constant development of human rights standards and the intensified surveillance in the area of human rights, the United Nations system has proved its viability. More than any other international body, it has understood that the protection of the weakest in the existing world order is the basic criterion by which to measure the true value of international cooperation.

Likewise, it is to the merit of the United Nations that many of the former colonies were able to free themselves from the bondage of colonialism in a peaceful and dignified manner, and become independent nations. It is, in fact, the decolonization and the full securing of the right, of States as well as of individuals, to live in freedom and equality, which is the core basis of the United Nations. And it is the United Nations combat against oppression and racism which has led so many small peoples in the world to place such high hopes in the Organization.

And this is precisely the perspective from which this meeting must be understood. For while a number of former colonies are now free and independent States, there are still peoples who live in conditions where they feel that their claim for lawful self-determination is not given the space and freedom to unfurl. People who still feel oppressed and deprived of their right to equality. People whose land and livelihood, culture and distinctiveness are not yet secured from coercive powers stronger and greater than they. People for whom the colonial structure is not abolished.

Unfortunately, the indigenous peoples of the world still belong to these peoples for whom the enjoyment of human rights is denied. For most of these peoples there is no immediate prospect of creating independent States. Partly for the simple reason that they as individual peoples are small in numbers. But also owing to the fact that the indigenous peoples share a common situation in which their lands have been enclosed within the boundaries of bigger State formations. Thus, we are left with the acknowledgement of the fact that the solutions used by the United Nations in the decolonization process are not readily usable for the indigenous peoples.

It is to the credit of the United Nations to have seen and to have been aware of this from very early on. As early as 1982, a special working group was established, under the auspices of human rights organizations, with the purposes of creating a special rights charter for indigenous populations. It is in this specific situation, where a people does not have the opportunity to create an independent State, that the State which encases it, has the responsibility to ensure that these peoples are secured the maximum freedom and dignity possible within the boundaries of the State.

Since 1982 it has been a goal of the United Nations to create the norms and set the minimum criteria for how this can be done. It is the purpose of this meeting to aid this process.

The paramount purpose of such work must be to ensure that, no matter how the States fulfil these norms, it is done in such a manner that the indigenous peoples are secured the highest degree of self-determination possible.

It was against this background that the United Nations Working Group on Indigenous Populations suggested that the present Meeting of Experts should be organized under the United Nations Programme of Action for the Second Decade to Combat Racism and Racial Discrimination. The combat against racism means combat for equality between people who live within the same territories. The attainment of equality is the best antidote to all forms of racism.

It is on the basis of our positive experiences in this particular field, with the establishment of home rule within the Danish State, that we, along with Denmark, wished for the meeting to be held here in Greenland.

It will be our task, in the next few days, to try to assess where the positive aspects of the establishment of ever increasing self-government for indigenous peoples lie. It is important that we all understand that these positive experiences not only are beneficial to the indigenous peoples, but also to the nation-States.

Naturally, not all will be concord and political harmony. But the feeling of being able to work with the disagreements in a dignified collaboration will remove the negative tension, which often poisons the relationship between two parties.

I would like to recommend this as the first experience which the meeting can learn from Greenland, and I would like to point out that self-government should be based on the possibility for dynamic development.

We have here in Greenland - in full accordance with the Danish Government - established a committee for foreign and security affairs, although these affairs belong under Danish jurisdiction and thus are not included in the Home Rule Act.

The prerequisite for establishing such a relationship is naturally that the various indigenous peoples within nation-States are given the right to decide over the land areas they inhabit. There must be a material basis for political rights. It is evident that the delimitation of land rights is one of the hardest problems to be solved in relation to the new self-governing parts of the nation-States, but the solution is at the same time an inevitable prerequisite for further collaboration.

Despite the fact that Greenland is an island, and that we, as Inuit, have always been in the majority on our island, we had to solve our land rights claim with Denmark through a compromise. During our negotiations on the Home Rule Act, this was the hardest point to overcome.

We accepted that the Constitution of the nation-State should not be broken and thus that its territory could not be apportioned. In return, Denmark accepted the principle that the resident population of Greenland had the fundamental rights to the natural resources of Greenland.

The result is that we decide from here on all activities in Greenland which are not related to mineral extraction. All decisions on mineral extraction in Greenland are made by Greenland and Denmark in unison, with both parties having a right of veto in the initiation and realization of mineral extraction projects. Likewise, we now have a profit sharing arrangement, whereby revenue is divided according to a scale both parties have agreed on.

I shall not go into this in depth, but only demonstrate that the consequence of the arrangement is that we in Greenland have in principle been given a collective property right to our own land. At the same time we have obtained the right of a collaborative partner to ensure, on an equal footing, that whatever happens in our land areas in the interest of the nation-State cannot take place without our consent.

It will be my second recommendation that the indigenous peoples are ensured the principal rights to their own land areas and at the same time are ensured a decisive influence on the utilization by the nation-State of the natural subsoil resources.

In that connection, I would like to point out that this is also a basic prerequisite for the protection of the environment, which we all fight for. It is of pivotal importance that the people who inhabit a given territory have a say in how development in an area is dealt with, if this is to be done in a sensible and sustainable way.

In connection with the reflections above, I would like to state that the prerequisite for the realization of the first recommendations is of course that States recognize the indigenous peoples as distinct peoples, and recognize their responsibility to the diversity and welfare of the nation-State.

Assimilation policies should, in today's world, be tales of the past, not only in relation to indigenous people. The developments in the world that we are witnessing these days show acutely that no people wish to be assimilated into huge nation formations with a regimentation of cultures, languages, and lifestyles. National identity can never be replaced by an identity based on political ideology or economics.

Throughout history, this has been true for indigenous people, but their views are now being heard in practice. In fact, this has been the foundation for the revision of the International Labour Organisation's Convention on Indigenous Rights, away from this principle of assimilation, and towards the right to cultural diversity.

The time has come, when all ought to realize that the nation-State thrives on diversity and not on uniformity. Though it is obvious that increasing international economic cooperation binds the nation-States still closer on a regional basis, it is just as obvious that, today, this goes hand in hand with demands from smaller units, within the individual nation-States, for the recognition, and assurance, of their cultural distinction.

I believe this combination of strengthened international cooperation and of increased priority on the independence of people is the theme of tomorrow and the new world scene. It is from diversity that creative cooperation draws its nourishment and inspiration. Respect for differences and a committed cooperation is the essence of democracy.

This aspect is tremendously important for indigenous people. For us it is more important to be recognized and respected as distinct peoples with our own history, culture and identity than it is to seek the dismantlement of nation-States, into small States without a real substance. There are fields where the nation-State is benefical to all of us, and these should be maintained, while we at the same time try to attain self-government within our own territories.

It must also be realized that it is seldom possible for indigenous people to establish an independent and sustainable economy. We must realize our interdependence with and our dependence on larger economical and political units, in much the same way even most nation-States must do today.

Seen with a positive outlook, it is at the same time these units which ensure us our land rights, our cultural distinctiveness and our self-government institutions, which can give us the opportunity to place ourselves on the international world map so that we can be seen, heard and understood.

I would like to make it my last initiating recommendation, that each indigenous peoples are recognized as independent peoples.

Last December, the United Nations General Assembly decided to make 1993 the International Year for Indigenous People. The decision has given us a unique opportunity to put focus on the position of indigenous people in the new world order.

In this connection, I would like to express the wish that 1993 not only becomes a year in which the United Nations puts focuses on indigenous peoples, but that it also creates an opportunity for us from the self-governing parts of nation-States to obtain a more independent status in the United Nations system.

We believe that we have much to contribute to a world which is in great need of a new cultural identity, and of a new understanding of the nature it is dependent on. We ourselves believe that since so many of us have been able to maintain basically the same way of living and to do so with a large degree of harmony with nature, then we have something we can contribute to the modern world of today, where, in many places, harmony with nature is disappearing.

The prerequisite is, of course, that we are ensured the right to maintain our own land areas, our culture, our identity and our history, on our own terms; and that this is understood in a dynamic way and not as an attempt to set time back. So our suggestion for the theme of the International Year is "The right for indigenous people to economic and democratic development".

We wish, as much as other people, to be fellow citizens in the modern world and to develop our cultures and societies in a dynamic interaction with the rest of the world.

But we wish to do this on our own terms and using our own guidelines, and this wish we share with all other peoples in the world. Greenland is a clear example that this is possible, not only for the newly freed States all over the world, but also for indigenous people.

This is why we wanted you to come here so that you could see for yourselves the positive effects of indigenous self-government, and this is why we are happy and proud to host this particular United Nations meeting.

It is my hope that this meeting will be able to send a series of positive recommendations to the United Nations on the establishment of rights for indigenous people; basic rights that in the United Nations and within our different nation-States can help us to secure our rightful place within the new world order.

May you have a productive meeting!

Speech by the Minister for Justice of Denmark,
Hans Engell

I am very pleased that it has been possible to hold this United Nations experts meeting concerning internal self-government for indigenous populations here in Greenland, where Home Rule has been practised since 1979. The participants of the meeting will have a good possibility to see for themselves how well the cooperation between national and Home Rule authorities can function.

We feel ourselves that we have established an appropriate framework for such cooperation, and that there is the goodwill on both sides to accept necessary compromises in order to fulfil mutual obligations, and in this way ensure continued development of the good relations between Greenland and Denmark.

Traditionally, Denmark has played a very active role in the field of human rights, both within international organizations and in other forums. Denmark has often promoted resolutions and proposals concerning human rights questions, both with respect to the right of the individual and with respect to collective rights.

Within the field of the rights of indigenous peoples I will mention that within the cooperation which takes place under the Conference on Security and Cooperation in Europe (CSCE), Denmark and Greenland have put forward a proposal concerning the strengthening of the rights of indigenous peoples.

In the context of the initiative called the "Arctic Environmental Protection Strategy", which was endorsed at a conference of Ministers of the Environment in Finland in June this year, Denmark was instrumental in bringing about an agreement ensuring that representatives of indigenous peoples hold seats as permanent observers. Denmark and Greenland will be hosts of the next conference of Ministers in the context of this initiative, in 1993 here in Greenland.

Prior to the international Conference on Environment and Development to be held at Rio in 1992, Denmark in cooperation with Greenland has put forward a written proposal for a resolution concerning the rights of indigenous peoples in questions concerning the environment.

The traditional Danish respect for fundamental human rights forms an inherent part of Danish law and is reflected directly or indirectly in statutes, regulations and legal interpretation. You will find documents with provisions concerning the rights of individuals as far back as the thirteenth century, and our Constitution of 1953 contains a catalogue of the fundamental rights of the individual. Danish law, furthermore, contains a number of special provisions which aim at safeguarding fundamental rights. For example, the Penal Code contains provisions concerning racism and discrimination. But Danish law also has statutes concerning the rights of minorities, one of the best examples being - as a matter of fact - the Home Rule Act concerning Greenland.

During the last decade, concurrently with increased international concern with regard to the human rights situation in the former communist countries and in a number of other countries throughout the world, public interest in Denmark in questions concerning human rights has grown.

The Danish courts and other public authorities have become more and more aware of Denmark's international obligations in the field of human rights. In May 1991 a committee under the Ministry of Justice submitted a report recommending that the Danish Government propose a bill to the Danish Parliament whereby the European Convention on Human Rights, which was ratified by Denmark in 1953, would be incorporated into Danish law by a special statute. Although this Convention, as well as other international conventions ratified by Denmark, may of course be invoked before the Danish courts, the Committee has been of the opinion that it would strengthen the respect of the principles contained in the Human Rights Convention, if the Convention were transformed into Danish law by a special statute. As to the question of the incorporation of United Nations Conventions on Human Rights into Danish law, in particular the International Covenant on Civil and Political Rights with its provisions concerning - among others - minorities, the Committee closely follows the considerations in other Nordic countries.

Home Rule in Greenland became a reality in 1979 after the Greenlanders had approved the Home Rule Act by referendum. The Danish Constitution whereby Greenland is an integral part of the Danish Kingdom with equal rights remained unamended.

The main purpose of the Home Rule Act was to transfer powers and responsibility - in the fields listed in an annex to the Act - from the Danish political authorities to the Home Rule authorities established by the Home Rule Act.

The fields transferred were, of course, the organization of Home Rule in Greenland and the organization of local government. In addition, other fields of basic importance to the functioning of Greenland society on its own conditions were transferred.

The fact that the unity of the Kingdom remained unchanged meant, however, that certain powers could not be transferred to the Home Rule authorities. This was the case of, for example, external relations, national finances and defence policy. Within my own sphere of competence I could mention, for example, the administration of justice, criminal law and family law.

In these fields the national authorities will, of course, act with due regard to specific Greenland conditions, taking into account opinions expressed by the Home Rule authorities.

In accordance with the Home Rule Act bills which include provisions which exclusively concern Greenland shall be referred to the Home Rule authorities for their comments before they are introduced in the Danish Parliament.

Other statutes and administrative orders which are of particular importance to Greenland shall likewise be referred to the Home Rule authorities for their comments before being put into force in Greenland. As a rule it is left to the Home Rule authorities to decide which statutes and orders are of particular importance to Greenland.

Over the years this procedure has been extended and an increasing number of bills and administrative orders are now referred to the Home Rule authorities for their comments.

As for the financing of the Home Rule system, the Home Rule Act provides as the main principle that the Home Rule authorities assume responsibility for expenditure in fields which have been transferred to them. In these fields the Home Rule authorities bear the full economic, political and legal responsibility.

Where national subsidies are required, powers are transferred to the Home Rule authorities by specific authorizing acts, whereby a framework concerning the field in question is established. Detailed regulation is left to the Home Rule authorities.

During the last few years, an increased part of the national subsidies have been granted in the form of a "block grant" which the Home Rule authorities may, to a very great extent, use without interference from the State authorities.

Almost all the fields mentioned in the annex to the Home Rule Act have now been transferred. I should mention that protection of the environment was transferred in 1988, and the transfer of the public health service is scheduled for 1 January 1992.

The Danish authorities see to it that consideration is given to the special Greenland conditions to the greatest extent possible in connection with regulations in fields which have not been transferred.

As Minister of Justice, I should like to draw attention to a particularly good example of a statute where special regard has been given to Greenland conditions, namely the Greenland Criminal Code.

The Greenland Criminal Code is exceptional and unique in its creation of a system of sanctions which are inspired not by the gravity of the offence itself, but by a desire to rehabilitate the offender and to protect society.

The Criminal Code does not prescribe sanctions for specific offences, but the decision on sanctions shall give proper consideration to the nature of the crime and society's interest in counteracting similar actions. Special regard shall be given to the personality of the criminal and to what is deemed necessary to prevent him from committing further crimes.

The Criminal Code is built on the results of the inquiries of a legal mission during a journey in Greenland in 1948-1949. The mission was sent by the Danish Government to study whether to introduce Danish criminal law to Greenland or to codify the existing law of Greenland It came to the

conclusion that punishment for a crime could often be more disruptive of a small community than the crime itself and that sanctions could often increase rather than reduce the community discord generated by a crime. This perspective on criminal sanctions is incorporated in the Criminal Code.

The traditional legal sanctions in Greenland were conditioned by feelings of social solidarity, by an intimate knowledge of the offender, by the lack of prisons or similar institutions and by the smallness and isolation of the communities. The Criminal Code therefore intended to preserve the existing pattern of legal sanctions, that is individualized treatment of criminals without isolating them from society.

In order to emphasize that punishment, as it is traditionally conceived, is only one of the sanctions, the Code uses the words "will be convicted of" instead of "will be punished for".

The most radical sanction is custody. Other than this, warning, fine, supervision, suspended sentence and placement in institutions are applicable. If a convicted person is sentenced to custody, he is normally allowed to work outside in the community during the daytime.

During more recent years, the Criminal Code has been exposed to criticism for being insufficient and for offending the community's sense of justice concerning severe crimes. It has also been said that the lack of specific sanctions for specific offences might lead to arbitrary decisions.

But it is important to stick to the spirit of the Criminal Code and to preserve the intentions of special prevention and resocialization. The provisions and their flexibility leave the courts considerable freedom to take into account the population's feeling of justice towards the offender and his crime, as well as individual considerations.

However, since the Greenland Criminal Code was written, in the 1950s, Greenland has undergone immense development. What was the right thing in the 1950s may, of course, some day prove to be less appropriate with regard to a Greenland society which, more and more, acquires the features of other modern societies. We are, of course, willing to adapt the Criminal Code as new needs arise in modern Greenland society.

A very important aspect of the relations between the Danish State and the Greenland Home Rule authorities is the Mineral Resources system for Greenland, which was established in 1979 as part of the Home Rule status for Greenland.

The basic elements of this system are as follows:

Joint decision-making competence, with mutual right of veto for the Danish State and for the Greenland Home Rule authorities concerning important dispositions regarding non-living resources in Greenland;

Distribution between the Danish State and the Greenland Home Rule authorities of public revenue from activities pertaining to non-living resources in Greenland;

An equally balanced Danish/Greenland Joint Committee on Mineral Resources in Greenland to advise the Greenland Executive and the Danish Minister of Energy;

Administration of the mineral resources sector handled by the Mineral Resources Administration for Greenland, with associated institutions under the Minister of Energy.

This system has been functioning well for almost 12 years, with some modifications being agreed upon in 1988. Danish/Greenland cooperation within this framework has proved constructive and has produced solutions to a number of questions with which both sides can be satisfied.

Most recently, this was demonstrated by the acceptance and adoption in Greenland and Denmark of a new act on mineral resources in Greenland. This act, which entered into force on 1 July 1991, is designed as a basis for the implementation of a new and more dynamic policy regarding exploration and exploitation of mineral resources in Greenland. This common Danish/Greenland policy was recommended unanimously by the Joint Committee and endorsed by the Greenland Executive and the Danish Government.

Denmark became a member of the European Economic Community (EEC) in 1973. When the Home Rule Act entered into force in 1979 it was assumed that Greenland would continue its membership of the EEC.

In 1982, however, Greenland decided by referendum to leave the EEC, and with effect from 1 February 1985 was no longer a member.

The Danish authorities, in their negotiations with the EEC, have made every effort to obtain the most favourable arrangement for Greenland, which was finally associated with the EEC, with the status of an overseas territory.

I dare say that the status of Greenland within the EEC today is favourable, with free access to the EEC market and with subsidies from the EEC in return for EEC fishing rights in Greenland.

I wish to underline that the Danish authorities always have the special Greenland conditions in mind in negotiations with the EEC.

An aspect of the responsibility which is felt by the Danish authorities towards the special interests of Greenland was reflected in a joint declaration of November 1989 by the EEC Council, the EEC Commission and the Governments of Denmark, France, the Netherlands, Portugal and the United Kingdom on the procedure to reconcile divergent interests of the European Community and certain territories of the Member States in international conferences. In this declaration, the main principle is that a Member State should, in the first place, seek separate representation for overseas territories at international conferences. In any case, the EEC organs shall be kept informed of potential conflicts between the interests of the EEC and the territory in question. But in the event that it proves impossible for the EEC organs to reconcile a conflict, it should be possible for the Member State concerned to vote and speak separately for its overseas territories.

In the context of cooperation between the Nordic countries, independent Greenland representation in the Nordic Council is assured by two Greenland members of the Danish delegation appointed by the Greenland Assembly (the Landsting).

Furthermore, the Greenland Executive (the Landsstyre) is an active participant - both at a political and an administrative level - in the work of the Nordic Council of Ministers, primarily in the fields of culture, education and fishing.

Finally, I wish to mention that the Danish Government, in all international forums where Greenland is not represented itself, is very much aware of specific problems concerning Greenland, and that the Danish State on a number of occasions has subsidized international conferences concerning indigenous populations. As an example, I can mention the Inuit Circumpolar Conference.

The relations between Denmark and Greenland are characterized by tolerance, friendliness and mutual respect.

The coming into effect of the Home Rule Act has stabilized and further developed those good relations. And the cooperation between the Danish authorities and the Home Rule authorities is characterized by a mutual will and ability to find good solutions to sometimes difficult problems. This has resulted in a Home Rule system which I think must be among the best in the world, and which in a most profound way takes into account the interests of Greenland - not only in theory but very much so in practice.

The relations between Greenland and Denmark are, however, not static. On the contrary, the years of Home Rule have been a very dynamic period in our relations, providing the capability of substituting old agreements and arrangements with new ones adapted to new realities in Greenland. It should not be forgotten that over a rather short period of time Greenland has undergone development which has taken centuries for other peoples.

Both in Denmark and in Greenland we find that we have created a good framework for Danish-Greenland relations, which we would like to export to other parts of the world. But I must stress that the Danish Home Rule arrangement with Greenland - and for that matter also with the Faroe Islands - is based on Danish law, our common traditions and our view on how to organize society. This has been easy, because both the Greenlanders and the Faroese are the overwhelming majorities within a well-defined geographical area. Our Home Rule arrangements are very pragmatic solutions to our need and not a theoretical approach to the need of indigenous peoples in the rest of the world.

Though we are content with our Home Rule arrangements, they are not created to last forever. They have to be modified in accordance with the development of the surrounding world. In fact they can be looked upon as a result of the present worldwide interest in national cultural heritage. One of the great challenges will be to adjust them to the modern world, where one of the key words is internationalization. This might lead to a new pattern of

cooperation, where the national State will transfer more and more powers to international organizations. In the long run, this could mean that we would have to find new ways to cooperate within the Kingdom.

The special geographic conditions of the Kingdom of Denmark give us the possibility of saying that if the three parts grow apart, Greenland and the Faroe Islands have the possibility to leave. It was clearly stated by our Prime Minister during this year's summer meeting of the Nordic Council when discussing the relations of the Baltic States to the Soviet Union. However, I do not think we shall be facing this situation in the near future, partly because of our Home Rule arrangements, partly because of the economic, cultural and family ties within the Kingdom.

I wish all the participants a very pleasant and profitable meeting. I hope you will also have the time to enjoy some of the wonderful outdoor possibilities which Greenland so generously offers.

Statement by Mr. Jonathan Motzfeldt,
Chairman of the Meeting of Experts

Under the auspices of the United Nations we are working with a conference which has to my opinion chosen the right name, the right time, and - not least - the right place: Nuuk in our country, Kalaallit Nunaat.

Because it is a truth that Greenland is one of the newest self-governed communities in the world.

Secondly, Greenland has, through its situation with regard to its mother country, special conditions worth looking at when discussing self-government in any nation in the world having different minority groups.

Thirdly, the whole course of our efforts, the negotiations and the implementation of our Home Rule have happened without war, violence or other destruction which may occur during similar political confrontations.

One may immediately, at the beginning of this conference, raise the question: "What was the reason for me, together with, among others, the Premier, to start the negotiation and implementation of our Home Rule at the time?" The answer is not only that Greenland geographically is situated several thousand miles from the mother country. But, foremost, that this great land was for several thousands of years inhabited by Inuits who have survived the Arctic conditions of hard life and work.

For these reasons we must state that we - and nobody else - are the ones to know best how to create our life, our culture, our destiny. Mind you, without any accusation in the future from our side of our mother country or its population forcing on us a development not suited to our everyday life or to our future.

The fact that we have achieved good results from negotiations is in my opinion because of a good and sober understanding with the majority of the Danish population and especially the large majority of the Danish Parliament, cutting across party lines, as only the extreme right and left parties of the Danish Parliament were opposed to our Home Rule. The fact is, therefore, that our Home Rule is the product of joint Greenlandic and Danish efforts to this effect, and thus a joint task for us and our Danish friends. Now 12 years have elapsed since the introduction of Home Rule in Greenland. Are we satisfied with the arrangement? The answer to this is a clear "yes" for my part.

The establishment of the Greenland Assembly and the Executive, "the Landsstyre", the transfer of almost all community functions apart from defence, security and foreign relations policy and the administration of justice, as well as referenda concerning membership and non-membership of the European Economic Community have cost us a lot of money and have had in many cases also a human price.

Nevertheless, we are happy about our growing self-government under our own responsibility and duty. Those two are completely linked. We can observe not only here in Nuuk, but in all parts of the community - at school, in

church and in the home, the local authorities, the municipilaties, the organizations - all make an effort to do their best for a good and modern society, which has to survive in a world undergoing rapid changes.

Therefore this conference is very welcome just now. Because the eyes of the world are focusing more on us and on the ways of existence for self-governed communities. So that we, together and in solidarity, can prove that we are in no way a dying race, but that we are a part of this world. Each of us fights to obtain full freedom, and that is an important starting point, but all the time we must keep in mind that dialogue is the best weapon, not arms and violence, if a positive understanding of internal and external relations is sought; and none of use are able to dictate to the world around us.

Somewhere it is written that there is a time for everything. A time to speak and a time to be silent. Here, these days, we shall have a time to be together, until the time that we must part. It is my hope that together we shall confirm to ourselves and to the world at large that even in small societies there are values which are a pleasure to the world in its continued existence.

My best hopes to you all for this conference and once again I thank the United Nations and its staff for inviting us to this conference.

Welcome once again.

Ambito y ejercicio eficaz de la autonomía interna y el autogobierno

a) Esferas en las que la autonomía sería eficaz como medio de fortalecer el disfrute de todos los derechos humanos;

b) Medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones indígenas autónomas.

Documento de antecedentes

preparado por

Augusto Willemsen Díaz

Nota: Las opiniones expresadas en el presente documento son las del autor.

PALABRAS PRELIMINARES

1. AMBITO Y EJERCICIO EFICAZ DE LA AUTONOMIA INTERNA Y EL AUTOGOBIERNO

A. Esferas en las que la autonomía sería eficaz como medio de fortalecer el disfrute de todos los derechos humanos

1. Presupuestos que conforman un marco idóneo para que surja pacífica y democráticamente la autonomía institucionalizada dentro de la estructura del Estado;

a) Percepción del hecho de que el reconocimiento de la diversidad no debilita la unidad del Estado, como lo haría la uniformidad impuesta artificialmente;

b) Reconocimiento del carácter multiforme y de la diversidad de la sociedad;

c) Políticas de pluralismo;

d) Educación para la coexistencia pacífica y respetuosa dentro del Estado.

2. La autonomía como una de las formas de ejercer el derecho de libre determinación en y dentro del Estado.

3. El Estado y sus formas estructurales básicas. Estado unitario y Estado federal. El acceso a la autonomía en el seno del Estado afecta a la estructura del mismo.

a) El Estado y sus formas estructurales básicas;

b) El Estado federal;

i) El Estado federal clásico

ii) El Estado federal modificado y matizado

iii) Algunas de las formas "autonómicas" posibles dentro del Estado federal.

c) El Estado unitario:

i) Estado unitario centralizado

ii) Estado unitario con descentralización administrativa

iii) Estado unitario con autonomía política.

4. ¿Qué es y en qué consiste la autonomía?

a) Contenido y alcance indispensables de la autonomía política;

b) Elementos de la autonomía política;

i) La potestad autoorganizativa

ii) La potestad normativa

iii) La potestad de dirección política y ejecutiva

iv) La potestad jurisdiccional o de administrar justicia

v) La potestad de ordenar y administrar las finanzas.

c) La distribución y separación de competencias frente al principio jerárquico de suprasubordinación;

d) Arreglos para la prevención de los conflictos de competencia:

i) Reuniones periódicas

ii) Conciliación

iii) Mediación.

e) La composición arbitral;

f) Controles sobre los órganos de los entes autónomos:

i) El control judicial

ii) Control político del poder delegante.

g) Participación de los órganos autonómicos en la composición y el funcionamiento de ciertos órganos generales del Estado.

5. Entes públicos que tienen derecho a la autonomía

a) Entes públicos que tienen derecho constitucional a la autonomía;

b) Entes públicos que deberían tener acceso a la autonomía sin estar favorecidos específicamente por estipulación constitucional o de ley fundamental al respecto;

i) Pueblos indígenas que hayan entrado en relación de tratados o acuerdos con las autoridades estatales competentes o con las autoridades coloniales que las precedieron;

ii) Pueblos indígenas que hayan sido incorporados en forma indiferenciada y contra su explícita voluntad al Estado o a la entidad colonial que lo precedió;

iii) Pueblos indígenas que conformen un alto porcentaje de la población.

c) Procedimiento para acceder a la autonomía regional o de región con pueblos indígenas numéricamente importantes o mayoritarios en ellas:

i) La solicitud o petición original. Respaldo y ratificación por referéndum

ii) Tramitación de la solicitud.

1) Elaboración del proyecto de estatuto

2) Examen del proyecto por una comisión mixta legislativa

3) Si hay acuerdo en la comisión mixta

4) Si hay acuerdo en la comisión mixta con hasta tres puntos concretos de divergencia

5) Si, como resultado del referéndum, se aprueba el proyecto

6) Si la comisión mixta no alcanzare acuerdo

7) Si, como resultado del referéndum, sólo algunas de las provincias afectadas lo aprueban

8) Si, como resultado del referéndum, sólo una de las provincias afectadas lo aprueba.

d) Procedimiento para acceder a la autonomía étnica o de pueblo indígena:

i) La solicitud o petición original. Respaldo y ratificación por referéndum

ii) Tramitación de la solicitud.

1) Elección y nombramiento de los negociadores indígenas y nombramiento de los estatales. Redacción del documento de bases

2) Elaboración del proyecto de estatuto

3) Examen del proyecto por una comisión mixta de legisladores indígenas y legisladores no indígenas

4) a 9) Correspondientes, mutatis mutandis, a los puntos 3) a 8) del apartado c) ii) anterior.

6. ¿Qué se logra con la autonomía?

a) Beneficios y virtudes en el ámbito político

b) Ventajas en aspectos socioculturales

c) Beneficios económicos

d) Ventajas en áreas de perspectiva múltiple.

7. La importancia del principio de solidaridad. La cooperación

a) La solidaridad

b) La cooperación.

B. Medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones indígenas autónomas

a) Observaciones iniciales

b) Participación popular al institucionalizar la autonomía en la Constitución

c) Participación popular en el proceso de iniciativa y de acceso a la autonomía en casos concretos

d) Participación popular durante la existencia y el ejercicio de la autonomía

i) Formas directas e indirectas previstas o establecidas.

1) Directas

2) Indirectas.

e) Formas de participación popular directa que convendría agregar a las ya existentes

i) El plebiscito

ii) La iniciativa popular

iii) La petición popular

iv) La acción popular

v) El referéndum

vi) El recall.

f) La participación popular lleva el ingrediente de respeto por los derechos humanos de todos

g) Funcionarios que velen por la efectividad de los derechos y libertades

i) Procurador Autonómico de derechos humanos

ii) Procurador Autonómico de derechos históricos y específicos de los pueblos indígenas

iii) Otras figuras compatibles con las tradiciones indígenas.

h) La educación en materia de derechos humanos y la capacitación popular para la defensa de los mismos:

i) Proporcionará el conocimiento sistemático de la Constitución y los instrumentos internacionales de derechos humanos

ii) Fomentará el respeto de los derechos humanos y libertades fundamentales de todos

iii) Promoverá activamente la capacitación en materia de la defensa de sus derechos individuales y colectivos

iv) Pondrá el necesario énfasis en el respeto y la protección de los derechos de los no indígenas que vivan en el territorio indígena de la comunidad autónoma

v) Reforzará la vocación al mantenimiento de la paz

vi) Impartirá, con base en todo lo anterior y en las costumbres y tradiciones indígenas, la instrucción cívica y la formación social del educando.

OBSERVACIONES FINALES

PALABRAS PRELIMINARES

La autonomía dentro del Estado es una de las variadas formas en las que puede manifestarse el derecho de libre determinación de los pueblos indígenas. Atender esa reivindicación histórica y específica es una forma de dar vida al principio de la igualdad de derechos entre los pueblos y a la vigencia auténtica, real e integral de sus derechos humanos y libertades fundamentales.

Es una forma de ejercer la libre determinación de manera que no ataca ni afecta la integridad territorial del Estado. Es una concepción más profunda y equitativa de la unidad política en el Estado. Esto significa que se reorientan las políticas de éste, superando caducas nociones asimilacionistas e integradoras, reemplazándolas con el respeto y valoración de la identidad étnica indígena, el aprecio de su cosmovisión, costumbres y tradiciones y el apoyo a sus esfuerzos por dar contenido efectivo a sus derechos como pueblos y como personas en el marco de un pluralismo justo. Es, además, una forma directa e integral de construcción de la democracia, dando satisfacción a las justas aspiraciones y reivindicaciones indígenas.

La autonomía busca, en función de una nueva estructuración pluralista del Estado, devolver a los pueblos indígenas -en medida significativa- la oportunidad real y efectiva de restablecer ellos mismos sus propias instituciones, dentro de su cosmovisión y en función de sus valores, costumbres y tradiciones, retomando así la realización de su proyecto histórico como pueblos tal como lo conciban ellos mismos hoy en día.

Se trata, en breve, de la institucionalización de la autonomía indígena en el Estado y dentro de él. Pero, al lado de la autonomía institucional, subsiste la autonomía de hecho. En efecto, hay diversas manifestaciones de autonomía que habría que estudiar y caracterizar en un esfuerzo futuro. Existen formas de autonomía de hecho, no reconocidas pero actuantes, que comprenderían formas de autonomía ancestral milenaria, o sea comunidades y pueblos aislados en la selva o la montaña que no han trabado o mantenido contacto con otros grupos existentes en la sociedad global de lo que hoy es territorio bajo la jurisdicción de un Estado. También estarían comprendidas aquí formas de autonomía histórica de hecho, o sea pueblos que han vivido en contacto -esporádico o constante- con otros sectores de la sociedad global del Estado y que practican y viven una autonomía no reconocida por el Estado, pero vigorosa y palpitante. No han sido conquistados ni sometidos. No han sido ni están colonizados. Han hecho quizá una defensa militar exitosa de su autonomía (vgr. la nación Yaqui, en México).

También hay diversas formas de autonomía institucional que gozan de cierto grado, variante, de reconocimiento jurídico político de parte del Estado.

En ellas puede discernirse, por el sujeto titular de la autonomía, las regionales o territoriales y las étnicas o de pueblos indígenas. Hay entonces una autonomía regional, o sea, ámbitos autónomos en los que existen pueblos indígenas o grupos étnicos, o ambos, conviviendo con otros grupos de población de la sociedad global (vgr. Costa Atlántica de Nicaragua, Región Norte (pueblos indígenas) y Región Sur (grupos étnicos)). Asimismo existe una autonomía étnica o de pueblo indígena en su territorio (vgr. Pueblos y comarcas Kuna y Emberá y, en su momento, la comarca del Pueblo Guaymí, en Panamá). Por el estado de progreso y afianzamiento de su establecimiento, pueden establecerse las autonomías en vías de negociación (vgr. la Comarca Ngobe o Guaymí, en Panamá), las autonomías legalmente institucionalizadas en proceso de afianzamiento (vgr. la Comarca Emberá, en Panamá) y autonomías histórica y legalmente institucionalizadas y sometidas siempre a un proceso de constante erosión y recuperación (vgr. la Comarca Kuna en Panamá y los Resguardos y Cabildos indígenas, en Colombia, en particular en el Cauca). En el curso de la Reunión de Nuuk, los expertos indígenas establecerán con voz autorizada el estado jurídico y funcional de esas formas de autonomía y las fuerzas contrarias -siempre presentes- que intentan socavarlas y erosionarlas, ambicionando apoderarse de los recursos y de las tierras de los territorios indígenas autónomos.

En la presente nota no se ha examinado las manifestaciones concretas e históricas de las formas de institucionalizar las autonomías a las que se ha hecho referencia arriba. Siguiendo la enunciación del punto I del programa, ésta contempla, de la manera que han permitido las circunstancias y en forma teoricoabstracta, las "esferas en las que la autonomía sería

eficaz". Es decir, aquello en lo que, en principio, podría o debería consistir -para ser efectiva- la autonomía cimentada en la participación popular y el respeto a los derechos humanos.

Se deja así más bien a aquellos a quienes les ha tocado vivir esas realidades en el curso de sus vidas diarias, aportar a la Reunión de Nuuk sus experiencias y el conocimiento de ellas extraído, dando así contenido práctico sustantivo a esos aspectos abstractos. Así se interpretó la intención de quienes prepararon el programa.

Además, como se me pidió, me he acercado al tema con la vista puesta en particular en los países latinoamericanos. Esos han sido exacerbadamente centralistas, basándose, en general desde la época del surgimiento de los Estados actuales, en ideas y nociones de unicidad y homogeneidad cultural de la población que no se compaginan con la realidad de las poblaciones de esos países. Se necesita de un esfuerzo solidario y generoso, constructivo, paciente y perseverante que articule las realidades diferenciadas y distintas entre sí en Estados pluriculturales, multiétnicos y plurilingües. Una sociedad global en la que los elementos vivos y palpitantes de cada cultura e identidad etnicolingüística tengan cabida equitativa y respetuosa, vertebrados dentro del Estado, según principios y prácticas democráticas e igualitarias en cuanto a los derechos de cada uno, sin hegemonías, discriminaciones, explotaciones, opresiones ni represiones.

A. Esferas en las que la autonomía sería eficaz medio de fortalecer el disfrute de todos los derechos humanos

1. Presupuestos que conforman un marco idóneo para que surja pacífica y democráticamente la autonomía institucionalizada dentro de la estructura del Estado

Para que pueda surgir normal y democráticamente la autonomía institucionalizada de los pueblos indígenas en el seno de los Estados contemporáneos, es necesario que concurran ciertas circunstancias. Las principales y más obvias de éstas se enunciarán en seguida.

a) Percepción del hecho de que el reconocimiento de la diversidad no debilita la unidad del Estado como lo haría la uniformidad impuesta artificialmente 1/

La verdadera unidad nacional. La unidad que preocupa a los Estados puede lograrse más cabalmente y a nivel más profundo a través de una diversidad respetuosa de las diferencias entre los grupos existentes que reivindican una realidad diferenciada dentro de la sociedad global. Esa unidad será más sólida si se basa sobre esa diversidad que si se busca sustentarla sobre una uniformidad que no corresponde a los sentimientos profundos de los pobladores.

La diversidad en sí no niega la unidad y tampoco la uniformidad en sí produce necesariamente la anhelada unidad. Por el contrario, puede haber debilidad en la uniformidad producida artificialmente y fortaleza en la diversidad coordinada dentro de un todo armónico, aunque polifacético, a base del respeto a la especificidad de cada uno de los componentes. En ella cada

grupo participaría más plenamente, pues lo haría a base de sus propias concepciones, valores y patrones y no esforzándose vanamente por hacerlo a través de vías de expresión que le son extrañas.

Pluralismo, autogestión, autogobierno, autnomía y autodeterminación, dentro de una política de desarrollo endógeno, haría justicia a las aspiraciones de los pueblos y comunidades indígenas que han estado sometidas a interferencias e imposiciones durante tanto tiempo.

Con ello no se estaría fomentando ni propiciando diferenciaciones artificiales ni separatismos donde esos sentimientos no existen. Simplemente se reconocería así la realidad multiforme de las sociedades de los Estados en los que viven los pueblos y comunidades indígenas.

b) Reconocimiento del carácter multiforme y de la diversidad de la sociedad

Ese reconocimiento implica el abandono explícito y definitivo de la falsa concepción de unicidad y uniformidad de la población del Estado, que ha sido la fuente de tantos problemas y dificultades 2/.

Los pueblos indígenas siguen siendo realidades diferenciadas dentro de la sociedad global. Tienen el derecho colectivo a existir como pueblos distintos, a ser diferentes, a considerarse diferentes y a ser considerados como diferentes 3/. Confirman hoy, de manera clara y distinta, su determinación de seguir ejerciendo ese derecho histórico y han demostrado -a menudo a través de varios siglos- su resistencia a ser despojados de su identidad étnica como condición para ser aceptados en pie de igualdad en el seno de sociedades de los Estados a los cuales fueron incorporados sin su voluntad, o manifiestamente en contra de ella 4/. Razón de más para garantizarles el derecho a retener, desarrollar y transmitir a generaciones futuras la conciencia de su propia existencia y dignidad como pueblos libres, portadores de cultura propia.

Consecuentemente, los Estados en los cuales existan pueblos indígenas como realidades diferenciadas, cultural, social, jurídica y económicamente de otros sectores de la sociedad global, deben reconocer y establecer -de preferencia ya a nivel constitucional 5/ o por medio de ley fundamental (de carácter esencial) 6/ el carácter multiétnico, plurilingüe y pluricultural de la población del Estado 7/. Deben asimismo desarrollar ese principio constitucional por actos legislativos y medidas políticas y administrativas que les den contenido concreto 8/.

c) Políticas de pluralismo

El Estado estará obligado, en esa virtud, a adoptar y aplicar realmente políticas cimentadas en esa realidad multiforme, diversa y polifacética, así como a hacer todo esfuerzo por lograr la coexistencia pacífica, armónica y solidaria de los sectores y pueblos diversos de su población, a base del respeto a la especificidad de cada uno de ellos y de la igualdad de derechos entre todos ellos en el seno de la sociedad global.

En el marco de estas políticas de pluralismo cultural, jurídico, social, económico y político que deben adoptar esas sociedades, los pueblos indígenas tienen derecho a la asistencia necesaria a fin de tener realmente oportunidades y recursos para el pleno desarrollo de sus propias iniciativas, normas e instituciones que en el contexto de la sociedad global conduzcan al más pleno y efectivo disfrute y ejercicio de los derechos y libertades reconocidos en los instrumentos internacionales en la materia.

A ese respecto, el Estado tiene la obligación de apoyar y promover genuinamente los procesos de autogestión y autodeterminación por los que esos pueblos buscan reivindicar plenamente su identidad y retomar la realización de su propio proyecto histórico (tal como lo conciben hoy ellos mismos) actualizándolo y suplementándolo en la medida en que ellos mismos perciban como necesaria.

Para ellos, para la sociedad global y para el Estado, es esencial que se produzcan genuinamente el fortalecimiento y la consolidación del derecho (que tienen (colectivo en tanto que pueblos e individual en tanto que personas integrantes de esos pueblos) de afianzar, mantener, conservar, desarrollar y transmitir a generaciones futuras sus propias instituciones y prácticas culturales, sociales, políticas, jurídicas y económicas y su autoidentificación como tales pueblos o como integrantes de aquéllos.

En todo caso, esto debe basarse primero en las medidas necesarias tomadas para hacerles sujetos del derecho al pleno y efectivo disfrute y oportunidad de un ejercicio real de todos los derechos humanos y libertades fundamentales reconocidos en los instrumentos internacionales de derechos humanos. Asimismo de las responsabilidades y el cumplimiento de las obligaciones correspondientes reconocidas en los mismos instrumentos internacionales.

Ha de tenerse siempre presente a este respecto que, como es de conocimiento general, en la inmensa mayoría de casos estos pueblos fueron "incorporados" a los actuales Estados sin consultar su voluntad o bien, e incluso a menudo, contra su manifiesta voluntad de seguir ejerciendo la libertad, la soberanía y la independencia que antes ejercían.

A la luz de esa realidad histórica se les ha de reconocer además, en particular, el derecho a que el Estado establezca las medidas especiales indispensables a fin de reconocer y respetar las características diferenciadas de los pueblos indígenas en el seno de la sociedad global. Esto con el propósito de salvaguardar sus comunidades, personas, instituciones, tierras y bienes. Al hacerlo ha de ponerse énfasis especial en medidas que les faciliten la conservación de sus costumbres, tradiciones, usos y prácticas sociales, jurídicas, económicas, culturales y ambientales, así como sus derechos históricos y específicos.

De ello se desprende la necesidad de tomar debida cuenta de lo distintivo en lo global, o sea las características que distinguen a esos pueblos indígenas en el contexto de la sociedad global y, si es el caso, de otros sectores diferenciados a su manera dentro de la sociedad global o general. Esto conlleva en la práctica la manera mejor de atender esos aspectos en lo que perciben al menos tres áreas importantes en las que

hay que garantizar: 1) el respeto a las características diferenciadas y diferenciadoras, 2) la participación diferenciada en los esfuerzos generales y 3) el establecimiento de áreas territoriales o ámbitos de actividades o sectores de servicios públicos en los que se respetará la autonomía de esos pueblos, como manifestación de la libre determinación de los mismos dentro del Estado en cuyo territorio habitan 9/.

Una forma global y sistemática de hacerlo sería a través de la reestructuración del Estado por medio de la cual se reconozcan esas realidades y se establezca una pluralidad de centros de poder político, los estatales centrales y los autonómicos indígenas. Todo esto visto desde la unidad del Estado, pero con dimensiones distintas, adicionales a la centralizada. A esa posibilidad se dedica gran parte del presente trabajo que busca explorar las dimensiones y el alcance del establecimiento del Estado con autonomías, o Estado autonómico.

Debe dejarse claro que ésta no es sino una de las formas de libre determinación a la que tienen derecho los pueblos indígenas como pueblos que son. Si ellos en su sabiduría deciden en las circunstancias actuales de su existencia optar por esa forma de ejercer su libre determinación, nadie debe impedírselo y deben hacerse esfuerzos por encontrar con ellos las formas de ejercicio reales de ese derecho 10/.

Debería concebirse todo esto en función de una forma armónica y solidaria de convivencia dentro de una sociedad consciente de la diversidad que contiene y de la riqueza que para ella representa esa pluralidad y, por ello, respetuosa de las distintas maneras de pensar, de sentir y de concebir el mundo.

Para lograr esa armonía respetuosa han de hacerse esfuerzos de todo tipo, incluso, y muy importantemente, por medio de la educación pública.

d) Educación para la coexistencia pacífica y respetuosa dentro del Estado 11/

El cumplimiento de la obligación del Estado en el que existan diversas identidades étnicas, culturas e idiomas, y del deber y derecho de los pueblos y sectores así diferenciados, de desarrollar programas que preparen a todos los niños más adecuadamente para la vida en el seno de sociedades multiétnicas, pluriculturales y plurilingües, eliminando todo prejuicio racista y etnocentrismo agresivo en la interpretación de la historia y las aspiraciones de cada uno de los pueblos y sectores diferenciados que integren la sociedad global.

El Estado debe adoptar medidas especiales y positivas para promover por todos los medios, utilizando en particular los medios de difusión de masas y los materiales de educación en general, la educación y la información interculturales. En ellas se ha de poner el énfasis necesario en propiciar una clara percepción de la necesidad de que se haga igual justicia a todos en el respeto a su dignidad y en su diversidad. Se ha de dar gran importancia a la aceptación mutua, la tolerancia, el entendimiento, la comprensión, la amistad y la paz así como las buenas relaciones entre los pueblos indígenas y no indígenas y el aprecio de unos por otros en el seno de una sociedad pluralista.

Se debe estar bien consciente de que para lograr realmente que haya comprensión, cooperación y paz internacionales y respeto por los derechos humanos y libertades fundamentales a que se refiere la UNESCO en su recomendación de 1973 12/, se ha de pasar necesariamente por la comprensión, la cooperación y la paz entre los pueblos y sectores diferenciados de la sociedad global al interior de los Estados. Todo esto, basado necesariamente en el respeto a los derechos humanos y libertades fundamentales de todos ellos y en la igualdad de derechos y el justo reconocimiento de sus respectivas identidades etnicoculturales.

2. La autonomía como una de las formas de ejercer el derecho de libre determinación en y dentro del Estado*

Obviamente no se ha pretendido aquí, incluso por razones de limitación de tiempo y de espacio, desarrollar siquiera nociones fundamentales acerca de la libre determinación. El presente esfuerzo se contrae a examinar algunos aspectos del significado de ésta en una de sus manifestaciones internas, la autonomía. Algo ha de decirse, empero, en un esfuerzo por centrar el tema de la autonomía en el entorno de la libre determinación más amplia como una de sus múltiples y diversas manifestaciones.

En el contexto de las Naciones Unidas, la libre determinación aparece en la Carta de las Naciones Unidas (1945). En dos disposiciones, los artículos 1 (párr. 2) y 55 (párrafo de introducción) aparece como principio, formando parte de la expresión que se refiere al "principio de la igualdad de derechos y al de la libre determinación de los pueblos" 13/.

Este principio se desenvuelve en dos corrientes de acción. La primera es la de la descolonización que se encuentra, sin duda, entre los procesos más exitosos de las Naciones Unidas en sus propósitos formales. Un alto porcentaje de los pueblos ahora organizados como Estados soberanos e independientes y hoy miembros de la Organización, no gozaban en 1945 de la libre determinación, al menos no en forma plena.

Este proceso cobra especial vigor a partir de la proclamación de la resolución 1514 (XV) de la Asamblea General el 14 de diciembre de 1960 14/ sobre la concesión de la independencia a los países y pueblos coloniales. Es éste el instrumento de base del proceso, junto con una pléyade de resoluciones conexas y concordes acerca de los llamados pueblos coloniales. Entre esas otras resoluciones se ha de destacar la resolución 2625 (XXV) del 24 de diciembre de 1970 15/ que proclama la Declaración sobre los principios de derecho internacional referentes a las relaciones de amistad y a la cooperación entre los Estados en conformidad con la Carta de las Naciones Unidas. Esta le da impulso a muchos de los aspectos de ese proceso, en el que desde 1960 se da gran importancia a los principios de la unidad política y de la integridad territorial de los Estados. Estos principios llevan la

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* El hecho de que la presente nota se contraiga a esa forma de libre determinación no implica, de ninguna manera, que los pueblos indígenas no tengan o no deban tener acceso a otras formas de ejercer ese derecho, dentro y fuera del Estado.

intención de marcar las fronteras de lo permisible en materia de libre determinación cuando de Estados soberanos e independientes se trata. Con ese carácter ha permeado toda la acción intergubernamental, que marca claramente ese propósito.

La segunda corriente de acción y desenvolvimiento del derecho a la libre determinación se basa en la concepción de ésta como derecho humano fundamental, incluso a manera de requisito previo para el disfrute de todos los demás derechos y libertades. El carácter de la libre determinación como derecho humano fundamental parece quedar claramente establecido en su consagración con idéntico texto en el Pacto Internacional de Derechos Civiles y Políticos y en el Pacto Internacional de Derechos Económicos, Sociales y Culturales. Es significativo que esto se haga en el respectivo artículo 1, con idéntico texto. Esto lo presenta ya como clave para los otros derechos y libertades de que se ocupan estos importantes instrumentos internacionales que, con la Declaración Universal, integran la Carta Internacional de Derechos Humanos.

Según un autor: "la existencia -auténtica, real o integral- de los derechos humanos y de las libertades fundamentales solamente se da cuando existe la libre determinación" 16/.

En ese contexto se sitúa la exposición hecha en el Estudio de las Naciones Unidas sobre la discriminación contra las poblaciones indígenas, en cuyo capítulo relativo a Conclusiones, propuestas y recomendaciones se hace referencia explícita a la autonomía de los pueblos indígenas como forma de libre determinación 17/. En sus párrafos 269 a 276 y 580 a 584 se la concibe como una de las formas que adopta ese derecho cuando se postula su ejercicio en y dentro del Estado en el que viven esos pueblos. Se reconoce la importancia de este derecho de libre determinación como condición básica para que los pueblos indígenas puedan disfrutar de sus derechos fundamentales, así: "La libre determinación en sus múltiples formas es, consecuentemente, la condición previa fundamental para que las poblaciones indígenas puedan disfrutar de sus derechos fundamentales y determinar su futuro, a la vez que preservar, desarrollar y transmitir su especificidad étnica a las generaciones futuras [párr. 269].

En general, los pueblos indígenas tienen derecho a la libre determinación que les permita continuar una existencia digna y consecuente con su derecho histórico de pueblos libres [párr. 270].

El derecho a la libre determinación se plantea a diversos niveles e incluye factores económicos, sociales y culturales, además de políticos, que se deben estudiar en cada caso, a fin de establecer a qué nivel y de qué tipo se la requiere [párr. 271]."

En los párrafos 272 y 273 caracteriza cómo entiende el estudio referido las manifestaciones "externas" y las "internas", incluyendo entre estas últimas a la autonomía:

"En el sentido más amplio de sus manifestaciones "externas" ese derecho significa el derecho a constituirse en Estado e incluye el derecho a elegir diversas formas de asociación con otras comunidades políticas [párr. 272].

En sus expresiones "internas" dentro de la sociedad nacional, sin embargo, ese derecho a la libre determinación significa que un pueblo o grupo que tiene un territorio definido puede ser autónomo en el sentido de disponer de una estructura administrativa y un sistema judicial separados y distintos, determinados por ellos mismos e intrínsecos a ese pueblo o grupo [párr. 273] 18/."

Se concluye entonces que:

"Tal como se aplica a las naciones y los pueblos indígenas la esencia de este derecho es el derecho a la libre elección y, por lo tanto, los propios pueblos indígenas han de crear en gran medida el contenido específico de ese principio [párr. 276]."

Claramente se adopta a este respecto una posición que da por sentado el principio y afirma que la aplicación (el contenido específico) de este principio corresponde crearlo en gran parte a las naciones y pueblos indígenas.

Todo esto sólo en calidad de "pueblos indígenas" como "pueblos", sin otro requisito ni condición. El texto del artículo 1 de los dos Pactos dispone:

> "1. Todos los pueblos tienen el derecho de libre determinación. En virtud de este derecho establecen libremente su condición política y proveen asimismo a su desarrollo económico, social y cultural.
>
> 2. Para el logro de sus fines, todos los pueblos pueden disponer libremente de sus riquezas y recursos naturales, sin perjuicio de las obligaciones que derivan de la cooperación económica internacional basada en el principio de beneficio recíproco, así como del derecho internacional. En ningún caso podrá privarse a un pueblo de sus propios medios de subsistencia.
>
> 3. Los Estados Partes en el presente Pacto, incluso los que tienen la responsabilidad de administrar territorios no autónomos y territorios en fideicomiso, promoverán el ejercicio del derecho de libre determinación, y respetarán este derecho de conformidad con las disposiciones de la Carta de las Naciones Unidas." 19/

En efecto, al leer el texto de ese artículo se observa que ni en el párrafo primero ni en el segundo del mismo puede discernirse ningún elemento que lo relaciona en particular, explícita o implícitamente, con los pueblos coloniales.

En el párrafo tercero se estipula que tienen obligación de promover el ejercicio del derecho de libre determinación y de respetar ese derecho de conformidad con las disposiciones de la Carta de las Naciones Unidas, "los Estados Partes en el presente Pacto, incluso los que tienen la responsabilidad de administrar territorios no autónomos y territorios en fideicomiso". La referencia aquí parece orientada a no excluir a los Estados que se menciona, pero no a centrar en ellos el propósito de la disposición.

Por eso se lo considera inmerso en una corriente diferente, como derecho humano, sin condiciones ni requisitos. Ahora bien, en el proceso de desarrollo de esa dimensión como derecho humano fundamental, y a pesar de que el texto transcrito no contiene mención alguna de la unidad política y la integridad territorial de los Estados, se ha venido invocando esos conceptos como valladar protector.

Sin entrar ahora a examinar la concurrencia o no de justificación para esa transferencia de una corriente a otra, ni el alcance que se le dé a esa extensión, se entiende fácilmente que así lo hagan los Estados que en esa forma pretenden asegurar esos elementos concebidos como esenciales a su continuada existencia como tales Estados.

De esto resulta, sin embargo, que si se hace extensivos esos dos conceptos en esta área, lógico sería que se los transfiriera completos, necesariamente incluyendo las condiciones y los requisitos que traen incrustados. Eso implica la obligación de respetar la igualdad de derechos y la libre determinación de los pueblos.

A este respecto, resulta claro que para que el Estado sea titular de un respeto y protección plenos de su unidad política y la integridad de su territorio éste debe, a su vez, proceder de conformidad con ciertos principios proclamados por la Asamblea General de las Naciones Unidas. En el penúltimo párrafo de la resolución 2625 (XXV) se requiere que el Estado:

> "se conduzca de conformidad con el principio de la igualdad de derechos y de la libre determinación de los pueblos antes descrito y estén, por lo tanto, dotados de un gobierno que represente la totalidad del pueblo perteneciente al territorio sin distinción por motivo de raza, credo o color 20/.

> ... usa para precisar este concepto una fórmula particularmente feliz porque reafirma la necesidad de preservar la integridad territorial de los Estados soberanos e independientes, pero relaciona dicho concepto con la obligación de que éstos estén "dotados de un gobierno que represente a la totalidad del pueblo perteneciente al territorio, sin distinción por motivos de raza, credo o color"." 21/

Más adelante el mismo autor agrega:

> "Cuando está en juego la integridad territorial del Estado, no se aplica, en principio, el derecho a la libre determinación. Esta es una afirmación capital que determina el criterio de las Naciones Unidas en la materia. Pero la propia Declaración sobre los principios de derecho internacional referentes a las relaciones de amistad y a la cooperación entre los Estados exige que los Estados independientes y soberanos, para tener el derecho a que se respete su integridad territorial, se conduzcan "de conformidad con el principio de la igualdad de derechos y de la libre determinación" y estén, "por tanto, dotados de un gobierno que represente a la totalidad del pueblo perteneciente al territorio, sin distinción por motivos de raza, credo o color"." 22/

Hay unanimidad en considerar que si un segmento indentificable de la población de un país se ve excluido sistemáticamente de tomar parte en la vida económica o política podrían necesitarse métodos alternativos de asegurar esa participación.

Estos métodos cubren las "medidas de "recuperación" o de "discriminación positiva" de carácter provisional, a fin de dar a ese pueblo los medios de beneficiarse, de un modo real, de todos sus derechos y libertades" como se estipula en la Conclusiones de San Marino 23/. Pero también hay entonces medidas mucho más serias que, según ese y otros textos internacionales, puede tomar ese pueblo cuando se le niega persistentemente la oportunidad de participar en forma significativa en la vida económica y política y en los procesos de toma de decisión en esos ámbitos. Se ha opinado que en esas circunstancias el pueblo interesado puede, en última instancia, recurrir al principio de la libre determinación, en alguna de sus variadas formas, a fin de asegurar una participación significativa en la vida de la sociedad en la que vive. Hay varios textos en los que se contempla la situación que se plantea en este párrafo.

Generalmente se cita a este respecto, y con razón, la Declaración Universal de los Derechos de los Pueblos (la Declaración de Argel) para ilustrar las consecuencias allí previstas para casos en los que los pueblos no encuentren otra salida para hacer valer sus derechos, que el uso de la fuerza 24/. Sobre este particular el artículo 28 dispone:

> "Todo pueblo... [cuyos] derechos fundamentales son gravemente desconocidos tiene el derecho de hacerlos valer especialmente por la lucha política sindical e incluso en última instancia recurriendo a la fuerza" (el subrayado es nuestro) 25/.

Un autor comenta a este respecto que se habla del "uso de la fuerza" quizá reflejando conscientemente el derecho a "la rebelión contra la tiranía y la opresión" mencionado en el preámbulo de la Declaración Universal de Derechos Humanos 26/.

La Declaración de San José sobre el etnocidio y el etnodesarrollo 27/, después de enunciar (en su párrafo quinto, numerales 4) a 10)) una serie de principios en los que se incorporan derechos fundamentales para los pueblos indígenas, en los numerales 11) y 12) del mismo párrafo, al hablar del desconocimiento de esos principios, hace referencia explícita a la rebelión contra la tiranía y la opresión sin llamarlo "derecho", utilizando literalmente los términos del párrafo tercero del preámbulo de la Declaración Universal de Derechos Humanos 28/ cuando dice:

> "El desconocimiento de estos principios constituye una violación flagrante del derecho de todos los individuos y los pueblos a ser diferentes y a considerarse y a ser considerados como tales, derecho reconocido en la Declaración sobre la Raza y los Prejuicios Raciales adoptada por la Conferencia General de la UNESCO en 1978 y por ello debe ser condenado, sobre todo cuando crea un riesgo de etnocidio.

Además, crea desequilibrio y falta de armonía en el seno de la sociedad y puede llevar a los pueblos al supremo recurso de la rebelión contra la tiranía y la opresión y a poner en peligro la paz mundial y, consecuentemente, es contrario a la Carta de las Naciones Unidas y al Acta Constitutiva de la UNESCO". 29/

En otro aspecto, el autor recién citado escribe que si se lee el artículo 28, citado supra, conjuntamente con los artículos 7 y 21 de la Declaración de Argel, esta Declaración apoya también implícitamente el derecho de un grupo minoritario de recurrir a la secesión de la entidad más grande si se le deniegan sus derechos humanos 30/.

El artículo 7 establece que:

"Todo pueblo tiene derecho a un régimen democrático que represente al conjunto de los ciudadanos sin distinciones de raza, sexo, credo o color y [sea] capaz de asegurar el respeto efectivo de los derechos humanos y de las libertades fundamentales." 31/

Y el artículo 21, a su vez, que:

"El ejercicio de estos derechos [de las minorías] debe hacerse en el respeto de los intereses legítimos de la comunidad tomada en su conjunto y en ningún caso podría autorizar un atentando a la integridad territorial y a la unidad política del Estado, cuando este último se conduzca conforme a todos los principios enunciados en la presente declaración" (el subrayado es nuestro) 32/.

Las Conclusiones de San Marino también se refieren a la secesión entre otros arreglos posibles:

"En virtud del derecho a la autodeterminación, todos los pueblos pueden dotarse de las instituciones políticas que les convengan y delegar, en especial a asambleas elegidas libre y democráticamente, su poder de decisión en cuanto a política, economía, cultura y asuntos sociales se refiere. Pueden decidir igualmente asociarse con otros pueblos en federaciones o en otras formas.

Cuando las instituciones así creadas no respondan ya a sus necesidades, aspiraciones y valores fundamentales, el pueblo debe poder, en todo momento y cualesquiera sean las circunstancias, decidir que se reemplacen por otras. Siempre debe poder, en última instancia, recuperar plenamente su poder de decisión en cuanto a política, economía, cultura y asuntos sociales o separarse de otros pueblos a que se hubiese unido, cuando esas instituciones pongan en peligro su existencia o no le permitan ya garantizar su misión fundamental de respeto de los derechos humanos y de las libertades fundamentales para todos, sin distinción de raza, sexo, lengua o religión" (el subrayado es nuestro) 33/.

Aparte de la rebelión y de la secesión como formas de ejercer el derecho de libre determinación, hay otras menos drásticas y que no afectan los principios de unidad política ni de integridad del territorio. Entre éstas está la autonomía.

Los pueblos indígenas que optan por la autonomía significativa dentro de los Estados en los que viven no están planteando la rebelión ni la secesión como derechos ni recurriendo a ellas. Están planteando el acceso a cierto grado autonómico de poder político dentro del Estado, particularmente en sus territorios ancestrales. No hay en ello separatismo, secesionismo ni rebeliones. Hay, sí, un planteamiento pacífico y que no ataca la integridad territorial del Estado.

La Declaración de San José de 11 de diciembre de 1981 incluye entre su articulado el siguiente texto:

> "9. El respeto a las formas de autonomía requeridas por estos pueblos [indios] es la condición indispensable para garantizar y realizar estos derechos" (los derechos fundamentales que plantea en sus párrafos 4 a 8) 34/.

Es indispensable 35/ apoyar a los pueblos indígenas en su reivindicación plena de la conciencia histórica de su pronta existencia y dignidad como tales y la toma de las riendas de su destino, según sus propias aspiraciones. Deben tener esa oportunidad, como todo otro pueblo, si se quiere evitar fricciones y conflictos que sin falta emanarán de la incomprensión y la injusticia.

Se impone el reconocimiento y la garantía de la igualdad de derechos y la libre determinación de todos los pueblos que integran la población del Estado.

El principio de la libre determinación de los pueblos consagrado internacionalmente no necesariamente implica la separación de los mismos del Estado para formar otros, como equivocadamente se afirma. Por el contrario, incluye formas de autonomía dentro del Estado.

Esta es la forma que en sus diversas manifestaciones parecen favorecer hoy los pueblos y comunidades indígenas en los países latinoamericanos. Hacerla posible es un imperativo de la convivencia pacífica y democrática dentro del Estado contemporáneo.

Se objeta a la libre determinación calificándola de separatismo e independentismo y de otras cosas más.

Lo cierto es que la autonomía es una opción que puede y debe abrirse dentro del Estado y que implica, como se verá más adelante en la presente nota, una distribución y transferencia de poder, incluso y en lo fundamental, de poder político, pero dentro del Estado.

3. El Estado y sus formas estructurales básicas. Estado unitario y Estado federal. El acceso a la autonomía en el seno del Estado afecta la estructura del mismo 36/

a) El Estado y sus formas estructurales básicas. Estado federal y Estado unitario

En el Estado unitario no necesariamente se dan entidades con autonomía política fuera de los órganos estatales centrales establecidos en la estructura clásica de este tipo de Estado, idea que, por el contrario, figura

en la esencia del Estado federal en su forma clásica o en sus formas más recientes.

En ninguno de estos tipos de estructura estatal parece haber arreglos de autonomía de pueblos indígenas que sean plenamente satisfactorio, a no ser quizá, por excepción, que puede surgir del examen que se hará en la reunión al considerar las experiencias concretas en esta materia, en la exposición de los expertos indígenas.

En ambos tipos de estructura estatal puede, sin embargo, establecerse mediante el proceso pertinente en cada caso, territorios regionales autónomos indígenas de mayor significación e idoneidad.

En el caso del Estado unitario, con el establecimiento de una o varias regiones indígenas autónomas o en la transformación del Estado unitario centralizado en Estado unitario autónomico. En el caso del Estado federal, éstas serían regiones indígenas autónomas como entidades autónomas adicionales y de tipo distinto, sea en territorios hoy bajo administración federal o en territorios de uno o más Estados federados.

b) El Estado federal

De manera sencilla y sin pretensión alguna de rigor científico descriptivo, pero sí creyendo apuntar a aspectos pertinentes para la presente exposición, aun hoy, a pesar de modificaciones y matizaciones puede afirmarse que las siguientes figuran entre las características principales del Estado federal en la actualidad.

i) El Estado federal clásico

Es un Estado formado por una pluralidad de centros de decisión política y jurídica que incluyen al Estado federal y los Estados federados. Estos últimos siguen siendo Estados con su constitución, sus órganos de gobierno y competencias propias que ejercen con independencia. Por lo general, siguen caracterizándose por tener poder constituyente propio. Participan en determinadas maneras en la formación de la voluntad del Estado federal y en la reforma de la Constitución federal.

Debe señalarse que existen hoy Estados federales que no surgen mediante el proceso clásico de integración de varios Estados soberanos presentes que se unen mediante un pacto federal, creando un nuevo Estado dotado de los órganos propios de todo Estado (legislativo, ejecutivo y judicial). Este es destinatario de la delegación de una serie de funciones que constituyen la competencia federal que se realizará en común para todos ellos (defensa, relaciones exteriores, comercio exterior, etc.), reservándose cada uno de los Estados que se federan entre sí el resto de las competencias que no han transferido explícitamente al Estado federal en la nueva Constitución ratificada por todos ellos al unirse entre sí para integrar el nuevo Estado. Esto se ha denominado cláusula residual o poderes residuales.

ii) El Estado federal modificado y matizado

Algunos de los Estados federales de nuevo cuño surgen de la transformación descentralizadora del poder político de un Estado unitario que deviene Estado federal, en virtud de decisión en el sentido de dividir federalmente el poder estatal. Las razones para proceder así pueden radicar, sea en la convicción de que es el sistema que más conviene al país, sea en la creciente dificultad o imposibilidad que pueden haber encontrado en mantener la unidad estatal sobre bases centralistas-centralizadas, o bien por razones diversas de conveniencia.

Numerosos de estos países federales han matizado y modificado el federalismo clásico y parecen estar matizando y transformando aún más ciertos de los aspectos de éste que conservaban.

iii) Algunas de las formas "autonómicas" posibles dentro del Estado federal

En algunos de los Estados de estructura federal han surgido las llamadas reservas indígenas en relación con el Estado y las autoridades federales, casi siempre por razones históricas. Esos arreglos están, por regla general, muy lejos de ser satisfactorios y fueron impuestos a los pueblos indígenas tras la agresión militar y han sufrido constante deterioro adicional. De esta reunión de Nuule saldrá con toda probabilidad una nueva apreciación de esas situaciones.

Por otro lado, en procesos de reestructuración estatal podrían surgir arreglos más satisfactorios y significativos. Podrían constituirse nuevos Estados federados con el fin de reconocer la autonomía a los pueblos indígenas que allí viven. No es extraña la existencia de los llamados "territorios federales" para designar áreas sujetas a las autoridades federales que podrían llegar a ser Estados federados al cumplirse los requisitos al efecto estipulados en la constitución federal. También podrían entonces unos de esos territorios federales, o al menos parte de éstos, devenir Estados federados con fines de constituir territorios autónomos indígenas en esa calidad. Asimismo en los Estados federados pueden establecerse entidades autónomas, de manera similar a como sucede en el Estado unitario, al considerársele unidad estatal con facultades para hacer esos arreglos en parte de su territorio.

El presente trabajo concentra atención en el Estado unitario.

c) El Estado unitario

En el Estado unitario hay siempre un solo Estado, una sola constitución y un solo ordenamiento jurídico estatal. Puede este Estado, sin embargo, adoptar varias formas estructurales de concentración (Estado centralizado) o de distribución de la administración y la decisión administrativa (Estado descentralizado administrativamente) o bien puede presentar también descentralización administrativa, pero como resultado consecuencial de la descentralización y distribución del poder político (Estado con autonomía(s) o Estado autonómico).

i) Estado unitario centralizado. En éste la unidad nacional se alcanza por medio de un proceso de organización uniforme y a base de centralizar todo el poder en las instancias unitarias.

En él existe sólo una instancia dotada, con la debida separación, de órganos y funciones de 1) capacidad normativa plena con potestad de dictar normas jurídicas con rango de ley, 2) plena capacidad jurídica de dirección política, de aplicación de las normas y de administración así como 3) la potestad de administrar justicia.

De este centro dependen -a través de una relación de subordinación jerárquica- todos los órganos de la administración (sean éstos centrales, intermedios o periféricos) con misión de ejecutar y aplicar, de modo uniforme en todo el territorio estatal, las decisiones y normas emanadas del único poder político, normativo, ejecutor y juzgador.

Las divisiones territoriales (provincias, municipios, etc.) tienen únicamente el carácter de circunscripciones para la prestación de los servicios estatales emanados de decisiones del poder central, único con poder político.

ii) Estado unitario con descentralización administrativa. En él, a pesar de que exite un único centro con poder político, capacidad normativa y potestad de administrar justicia plenos, se reconoce a ciertas entidades territoriales facultades para autoadministrarse. Esto significa poder para decidir la forma de aplicar en su circunscripción territorial las decisiones tomadas por el poder central y facultades para aplicarlas efectivamente, disponiendo del ejercicio de la potestad normativa reglamentaria y de la función administrativa.

Vale decir que se descentraliza la administración y la decisión administrativa, pero no la función política.

iii) Estado unitario con autonomía política. Esto supone un paso más en el proceso descentralizador. Se reconoce, en este tipo de Estado, junto a los órganos generales del Estado, la existencia de entes políticos territoriales con capacidad no sólo de autoadministrarse sino, principalmente, de autogobernarse, lo que trae consigo la autoadministración.

Es decir, tienen plena capacidad -dentro del marco de competencias en materias determinadas y con vigencia en las circunscripciones territoriales correspondientes que hayan sido reconocidas constitucionalmente- para: 1) tomar por sí solos las decisiones políticas que crean pertinentes, incluso la determinación concreta de sus opciones políticas diferenciadas dentro de su propia orientación política; 2) dictar normas jurídicas con rango de ley y 3) administrar justicia.

Vale la pena señalar que sigue habiendo un solo Estado, una sola Constitución y un solo ordenamiento constitucional. Los entes autónomos no son Estados en sí mismos como sucede en cambio en las formas organizativas federal y confederal (y en otras más sueltas aún) y por ello no tienen poder constituyente independiente propio, ni Constitución propia, ni participan

plenamente como tales en la formación de la voluntad estatal general ni en la reforma de la Constitución del Estado. Están sometidos a controles más rigurosos que en Estados de esas otras formas organizativas.

4. ¿Qué es, en qué consiste la autonomía? 37/

a) Contenido y alcance indispensables de la autonomía política

Con la erección de un territorio autónomo dentro del Estado se realiza explícitamente una distribución del poder político, una descentralización política, no solamente una nueva descentralización administrativa. Vale decir que esto comporta una distribución del poder legislativo y del poder ejecutivo-administrativo, así como, en ciertos casos y niveles, del poder judicial.

Surgen así niveles distintos, cada uno de ellos atribuido respectivamente en esos ámbitos legislativo, ejecutivo y judicial, en forma recíprocamente excluyente al nivel estatal o general y al nivel regional o autonómico. Estos poderes legislativo, ejecutivo y judicial centrales y los autonómicos, son independientes los unos de los otros, sin que ninguno de ellos pueda legalmente invadir, interferir o usurpar el ámbito político de los otros y sin que se requiera ninguna intervención del poder central para la plena validez de las normas, las políticas y la ejecución de las mismas por los poderes autonómicos.

Se opera, entonces, una verdadera descentralización política y, por consecuencia, una distribución del poder político. En virtud de ésta se transfiere, otorga y atribuye a las partes que integran el todo, o sea a las regiones autónomas del Estado, ciertas funciones y potestades que antes ejercía el poder central. Concurre a formar el otro nivel, que completa los enunciados, el Estado mismo que conserva y retiene las funciones y potestades que no se transfiere. Así el Estado y las regiones o entidades autónomas tienen en las esferas central y autonómica, respectivamente, el poder de gobernar sin tutelas ni interferencias, con plena libertad, haciendo uso de las facultades que esto implica, sin más limitaciones que las establecidas en la Constitución y -bajo ésta- en los Estatutos autonómicos. No tendrá facultad el poder central, el gobierno del Estado, para revocar o anular las decisiones de ninguna comunidad autonómica esgrimiendo o argullendo razones de idoneidad u oportunidad. Sólo por razones de constitucionalidad y legalidad podrá impugnarse la actuación autonómica ante un tribunal constitucional instituido, inter alia, para ello.

Ha de señalarse, además, que es claro que en el Estado unitario la distribución del poder público no surge del pacto entre iguales, por acuerdo entre Estados previamente soberanos, elemento que figura en la base de la organización y distribución del poder político en los Estados federales de corte clásico. Surge sí de la voluntad de todos los ciudadanos de un Estado preexistente, manifestada a través de su Asamblea Constituyente.

Las entidades o regiones autónomas que surgen serán seguramente subdivisiones territoriales distintas de las inspiradas meramente en los esfuerzos descentralizadores y forjadas en cuadros de descentralización de la administración pública. Podrían, sin embargo, consistir de uno de aquellos

departamentos o provincias que coincidan con las regiones que se desea erigir en regiones autónomas (regiones unidepartamentales o uniprovinciales) o bien engarzar a varios de los antiguos departamentos o provincias (regiones pluridepartamentales o pluriprovinciales).

Cuando se erijan varias entidades o regiones autónomas y algunas de éstas sean contiguas, también podría darse el caso de que un departamento o provincia resulte dividido entre varias regiones autónomas y compartido por ellas, quedando atribuido en secciones distintas a regiones autónomas diferentes. Asimismo podría acontecer que una sección de un departamento o provincia resulte atribuido a una de las regiones autónomas emergentes, mientras que la otra sección del mismo departamento o provincia quede atribuida al territorio general del Estado, sea como departamento o provincia de área reducida o en otros arreglos que al efecto se haga.

Si los antiguos departamentos o provincias tienen cuerpos legislativos o diputaciones departamentales o provinciales, se producirán diversos resultados dependiendo de si las regiones autónomas que surgen son unidepartamentales o uniprovinciales o bien pluridepartamentales o pluriprovinciales. En el primer caso como regla general, la diputación departamental o provincial resultaría subsumida y extinguida al absorber sus funciones la propia región autónoma, sea atribuyéndoselas al cuerpo legislativo de la región autónoma correspondiente, o mediante otros arreglos que se haga al respecto. En el caso de entidades o regiones autónomas pluridepartamentales o pluriprovinciales podría, si así lo pidieren los municipios existentes en la región autónoma en las respectivas áreas antes departamentales o provinciales, mantenérselas a manera de entidades de apoyo, asesoramiento y coordinación de los municipios correspondientes. La autonomía consiste, pues, en que las entidades autónomas (regiones, comunidades, etc.) pueden autogobernarse con plena libertad política sin más limitaciones que las establecidas en la Constitución estatal y en sus respectivos estatutos autonómicos.

Entonces, para que la autonomía no consista en una mera ficción inoperante se requiere, según lo dicho, que ella incluya, por lo menos:

b) Elementos de la autonomía política

i) La potestad auto-organizativa, es decir, la facultad de estructurarse orgánicamente, con libertad y de acuerdo con sus tradiciones culturales, jurídicas y políticas diferenciadas en esas esferas. O sea, para establecer, del modo que crea más conveniente, sus propios órganos e instituciones de autogobierno sin que, al efecto, se requiera la intervención del poder central para su plena vigencia. Esto constituye la autonomía de organización interna o de autogobierno.

ii) La potestad normativa, o sea de la facultad de iniciar, elaborar y promulgar leyes y reglamentos en los ámbitos determinados y dentro del marco definido como el autonómico por el respectivo estatuto y que no requieren la intervención del poder legislativo central para su plena validez. Consiste ésta en la autonomía legislativa.

iii) La potestad de dirección política y ejecutiva, o sea para fijar libremente sus opciones y objetivos propios en aquellas materias que son de su competencia autonómica según el texto constitucional. También tienen la facultad de tomar decisiones y formular políticas que desarrollen sus propias competencias y atribuciones específicas así como de aplicarlas libremente, sin necesidad de la autorización previa ni de la aprobación posterior de las mismas por parte del Estado central.

Esto significa que, correlativamente, el Estado no tendrá facultad para revocar o anular las decisiones de ninguna entidad autónoma esgrimiendo razones que no sean la falta de legitimidad constitucional de las mismas, lo que podrá hacerlo sólo ante el tribunal constitucional que corresponda. Conforma la autonomía de dirección política y de poder ejecutivo-administrativo.

iv) La potestad jurisdiccional o de administrar justicia, o sea la facultad de crear o reconocer en el estatuto autonómico entes jurisdiccionales para declarar y aplicar el derecho en casos concretos con aplicación de normas jurídicas sustantivas y adjetivas propias y en los ámbitos y niveles determinados por el estatuto autonómico, sin que sus fallos queden sujetos a recursos ante otros niveles jurisdiccionales (salvo la prueba de legitimidad constitucional). Autonomía en la administración de justicia en las materias asignadas específicamente.

v) La potestad de ordenar y administrar las finanzas. Se ha de reconocer a la entidad autónoma amplia libertad tanto en la obtención de recursos financieros económicos como en la determinación de la forma en la que éstos deben invertirse y gastarse. Esto constituye la autonomía financiera.

Son los estatutos de cada entidad autónoma los que han de determinar y regular las instituciones de autogobierno, las competencias que asumen y los recursos financieros de que disponen para su desarrollo.

Aquí ha de señalarse que en el caso del Estado "regionalizado" se transfiere las potestades concretamente determinadas en la Constitución o ley fundamental mientras que en el Estado "regionalizable" se establece en la Constitución sólo lo que puede asumir la entidad autónoma excluyentemente y establecer las competencias que se reserva el Estado y las que éste puede delegar y/o compartir con las entidades autónomas. Esto conforma el marco y la base de fondo a las condiciones que cada estatuto de autonomía dará a las reivindicaciones o demandas objetivas y subjetivas y a las de cada pueblo, nacionalidad o región correspondiente.

c) La distribución y separación de competencias frente al principio jerárquico de suprasubordinación

En los Estados unitarios centralizados, los órganos de poder se organizan para desempeñar sus respectivas funciones en jerarquía de suprasubordinación correspondiente.

En los Estados unitarios con autonomía(s) se crean áreas nuevas de competencia. Se separan las competencias autonómicas de las competencias estatales centrales. Como se realiza una distribución con separación de

poderes autonómicos y centrales en cada una de las funciones básicas, se conserva la jerarquización dentro de cada ramal de competencias y surgen así dos vías jerárquicas independientes y paralelas, que no deben cruzarse.

Como resultado no hay jerarquía entre las áreas competenciales estatales centrales y las autonómicas. Entre ellas hay separación, sin que una de ellas pueda predominar y prevalecer sobre la otra.

El órgano o funcionario más bajo de una vía prevalecerá sobre el más alto de la otra en sus intentos de interferir en la acción legal y legítima de potestades dentro de la competencia del primero, y viceversa.

d) Arreglos para la prevención de los conflictos de competencia

i) Reuniones periódicas de representantes o comisionados estatales y representantes o comisionados autonómicos para examinar conjuntamente las áreas de actuación en las que podrían surgir o han surgido diferencias de opinión o divergencia de enfoques. Se trata de aunar esfuerzos por encontrar formas de conciliar intereses y puntos de vista a fin de evitar controversias que pueden devenir conflictos en casos en los que no se argumenta ninguna violación de la Constitución. El caso se puede remitir a procesos de conciliación y de mediación de esas divergencias y las controversias que se desarrollen a pesar de esos esfuerzos.

ii) Conciliación. Reuniones formales de las partes en una controversia bajo la dirección de un funcionario de la confianza de ambas partes, con el fin de conciliar las diferencias y resolver e intentar la concertación de un acuerdo en el que las partes acepten hacer ciertas concesiones con legitimidad constitucional y legal recíprocas entre sí a fin de obviar el conflicto. El conciliador juega un papel de mero impulsor de las conversaciones, instando a las partes a considerar los puntos de vista opuestos al propio.

iii) Mediación. Nombramiento de tercera persona de la confianza de ambas partes para que intervenga entre los representantes estatales y los autonómicos con el propósito de reconciliarlos o persuadirlos a ajustar sus posiciones y solucionar sus disputas dentro de la Constitución y la ley. El mediador juega un papel activo y hace propuestas y contrapropuestas.

e) La composición arbitral

Arbitraje. Nombramiento del titular de la fusión pública estipulada en el estatuto autonómico o tercera persona de la confianza de la partes, seleccionada de acuerdo con los requisitos establecidos en el estatuto, con el propósito de que conozca en el caso de un conflicto concreto y lo decida, sometiéndose de antemano las partes a acatar su laudo, en calidad de sentencia, en su contenido y efectos.

Diferente es el caso cuando se impugna la legalidad o la legitimidad constitucional de una norma o un acto de los órganos autonómicos.

f) Controles sobre los órganos de los entes autónomos

Cabe repetir que para que exista autonomía política genuina y efectiva los entes autónomos deben poder determinar libremente su orientación política sin más límites que los que derivan del deber de respetar la Constitución y el ordenamiento jurídico fundamental del Estado (principios de constitucionalidad y de legalidad).

i) El control judicial. Legalmente, el único control posible es el ejercido por los tribunales de justicia a los que se haya dado jurisdicción y competencia al respecto, a fin de comprobar si la actuación de esos órganos autonómicos se concilia con las normas jurídicas vigentes de rango fundamental del Estado.

Según la naturaleza del acto impugnado se deberá recurrir al Tribunal Constitucional, de Garantías Constitucionales, o su correspondiente, que se ocupa de la impugnación de la legitimidad constitucional de las leyes cuando se trate de una ley autonómica, o al Tribunal de Conflictos de Competencia, creado especialmente al efecto y que tendrá funciones y facultades de tribunal de lo contencioso-administrativo para conocer de casos en que se impugnen las actuaciones administrativas y normas reglamentarias de las entidades autonómicas, así como al Tribunal de Cuentas, cuando se trate de las actuaciones económico-financieras y presupuestarias de esas entidades autonómicas.

ii) Control político del poder delegante. Cuando se trata de diferencias en relación con el ejercicio de facultades delegadas, la cuestión no pasa a control judicial. En cambio, sí es susceptible de los procedimientos de prevención, conciliación y mediación, debiendo ser considerado en las reuniones periódicas, a menos que concurran circunstancias extraordinarias que hagan urgente la acción. Se ejerce entonces un control político directo, cuando fracasan la conciliación y la mediación o cuando haya circunstancias que exijan acción inmediata.

Excepcionalmente, en el caso de las facultades delegadas o transferidas a los órganos autonómicos por una ley orgánica, competencias que en principio corresponden al gobierno central estatal, se ejerce un tipo de control político, ejecutivo-administrativo por el Gobierno central, previo dictamen favorable a esa acción por el Consejo de Ministros.

g) Participación de los órganos autonómicos en la composición y el funcionamiento de ciertos órganos generales del Estado

Se mencionarán aquí los mecanismos por medio de los cuales contribuyen los órganos autonómicos a formar la voluntad del Estado, aunque en forma débil e incidental.

Participarán en la integración del cuerpo legislativo general designando el número de representantes en el Senado o Cámara alta de aquél en los sistemas bicamerales. En los sistemas unicamerales, podría preverse una participación corporativa como parte de la composición del cuerpo legislativo central.

Estarán facultados para interponer recursos de inconstitucionalidad y de amparo en materias de su competencia autonómica.

Participarán en los procesos legislativos generales a través de la iniciativa legislativa. Podrán siempre designar comisiones informativas que asistan a las sesiones de la asamblea legislativa general cuando se discutan materias que corresponden o podrían afectar a la autonomía de los entes autónomos, y en particular cuando pueda afectarles a ellos directamente.

Participarán en la actividad planificadora del Estado proporcionando al Estado central previsiones económicas para que se las tome en cuenta al elaborar proyectos de planificación general.

Participación en los procesos de reforma constitucional cuando en ella se incluyan los artículos que se refieren o afectan al régimen autonómico previsto.

Están facultados para presentar iniciativa de ley y participar así en el proceso legislativo general.

Están facultados para presentar iniciativa para la reforma constitucional.

Tendrán derecho de petición ante el Gobierno central.

Estarán autorizados para, si así lo desean, poder actuar como delegados o colaboradores del Gobierno central para la recaudación, la gestión y la liquidación de los recursos tributarios del Estado.

5. Entes públicos que tienen derecho a la autonomía 38/

Este derecho puede surgir de la declaración expresa de la Constitución o de una ley fundamental, de la forma de incorporación de los pueblos indígenas al Estado y su importancia numérica relativa (porcentaje) en la población del mismo junto con la forma en que se conduzca el Estado, o bien de esta última circunstancia y el derecho fundamental de todo pueblo a la libre determinación reconocida en la Carta Internacional de Derechos Humanos. Este capítulo se propone examinar algunos aspectos de esas hipótesis y terminar con breves referencias a las iniciativas y al proceso de acceso real a la autonomía.

a) Entes públicos que tienen derecho constitucional a la autonomía

Son titulares formales de la autonomía i) los declarados titulares de la autonomía o autónomos en la Constitución o en ley fundamental y ii) los declarados titulares del derecho a obtener la autonomía cuando cumplan las condiciones y requisitos estipulados para ello en la Constitución o en ley fundamental.

Entes a los que se declara autónomos. En este caso se determina precisamente en el texto constitucional o en la ley fundamental cuál(es) es (son) la(s) comunidad(es) que el Estado reconoce autónoma(s). La autonomía se hace realidad jurídica en el mismo texto constitucional o legal y habrá sólo que desarrollar esas disposiciones para darles forma concreta.

Es la voluntad de todos los ciudadanos a través de sus representantes en una asamblea constituyente o en el cuerpo legislativo ordinario con voto calificado o con formalidades o solemnidades, la que establece, desde ya, esa(s) autonomía(s). Se trata en este caso del Estado "regionalizado", organizado territorialmente con una o más regiones autónomas a la(s) que se reconoce por ese acto el derecho a la autonomía y se la(s) erige en ese carácter, explícita y directamente.

Entes a los que se declara con derecho a acceder a la autonomía si se dan ciertos supuestos y cuando se den. Se reconoce el derecho que podrán ejercer los entes que cumplan determinados requisitos y condiciones mínimas que fija taxativamente el propio texto constitucional y se hará realidad cuando esto suceda.

La voluntad de todos los ciudadanos del Estado a través de sus representantes en la Asamblea Constituyente o cuerpo legislativo ordinario con voto calificado o cumpliendo formalidades o solemnidades hace posible potencialmente la autonomía. Como atribución real de poderes ésta sólo operará por medio de la voluntad expresa de los electores de la comunidad, región o nacionalidad concreta de que se trate en cada caso, manifestada en decisiones y actos tendientes a su establecimiento y por los estatutos de autonomía que redacten, aprueben y presenten estos mismos, una vez aprobados formalmente (ratificación formal) por la Asamblea Legislativa General del Estado.

En este caso se trata del Estado "regionalizable" que institucionaliza la posibilidad jurídica de la erección de entes autónomos dentro del Estado.

En todas estas hipótesis se establece un juego dialéctico entre dos principios, el de "unidad" y el de "autonomía". Para los Estados unitarios que han sido profundamente centralizados durante su vida independiente la aceptación de ese juego constituirá un cambio fundamental en la estructura formal de los mismos.

En el contexto del reconocimiento de autonomía en un Estado unitario, el principio de unidad se afirma en relación con el Estado, la Constitución y el ordenamiento constitucional garantes de esa unidad y del interés "suprarregional" de la sociedad estatal en su conjunto.

El principio de autonomía toma cuerpo con el reconocimiento a ciertos entes, a los que generalmente se identifica como regiones, territorios o nacionalidades dentro del territorio total del Estado, el derecho a gozar de autonomía política dentro de ese territorio.

b) Entes públicos que deberían tener acceso a la autonomía sin estar favorecidos específicamente por estipulación constitucional o de ley fundamental al respecto

Se ha visto en la sección precedente que ciertos entes son autónomos legalmente por declarar la Constitución o una ley fundamental que son autónomos o que pueden acceder a la autonomía como derecho establecido constitucionalmente si cumplen las condiciones y llenan los requisitos para

ello estipulados en la Constitución o ley fundamental, pues son titulares explícitos del derecho actual o potencial a la autonomía en el Estado que así lo determina y define en su Magna Carta.

En esa virtud, los pueblos indígenas que se encuentren en uno de esos dos casos, los declarados autónomos, o con derecho a la autonomía si llenan las condiciones y requisitos estipulados en la Constitución, tendrán claramente el derecho correspondiente por disposición constitucional o fundamental.

Fuera de estos casos, ¿habrá otros pueblos a los que se pueda considerar como titulares del derecho a la autonomía como derecho definido, por concurrir en ellos y en el Estado ciertas circunstancias que así lo hagan concluir?

Según lo expuesto en el capítulo segundo de esta nota, quod vide, siempre que los Estados en los que viven esos pueblos no "se conduzcan de conformidad con el principio de la igualdad de derechos y de la libre determinación de los pueblos" y no "estén... dotados de un gobierno que represente la totalidad del pueblo perteneciente al territorio, sin distinción por motivos de raza, credo o color", y los pueblos indígenas del caso así lo reclamen, tendrán buena fundamentación para reivindicar su derecho a la autonomía como forma de libre determinación dentro del Estado, si concurre alguna de las siguientes circunstancias:

i) pueblos indígenas que hayan entrado en relación de tratados o acuerdos con las autoridades estatales competentes o con las autoridades coloniales que las precedieron, en los que se les reconozca alguna forma de autonomía politicoadministrativa y que estos arreglos no hayan sido cumplidos o respetados por el Estado.

ii) pueblos indígenas que hayan sido incorporados en forma indiferenciada y contra su explícita voluntad al Estado o a la entidad colonial que lo precedió con posterioridad a su derrota puramente militar, sin que ellos hayan aceptado nunca esa incorporación indeferenciada que significaría la pérdida de su identidad étnica y su calidad de pueblo libre, diferenciado dentro de esa sociedad global;

iii) pueblos indígenas que conformen un alto porcentaje de la población del país y, en todo caso, cuando excedan del 40% de la misma o del 80% de la de la región sin que hayan aceptado esa incorporación al Estado en forma indiferenciada que significaría la pérdida de su identidad étnica y de su calidad de pueblo libre, diferenciado en el seno de esa sociedad global.

Los pueblos indígenas no incluidos en ninguno de los tres grupos anteriores tendrán derecho a la autonomía como derecho humano fundamental al tenor de los artículos 1 de los Pactos Internacionales de Derechos Civiles y Políticos y de Derechos Económicos, Sociales y Culturales (ambos de 1960) particularmente cuando el Estado del caso no se conduzca en la forma prevista en la resolución 2625 (XXV) de la Asamblea General (1970), ya mencionada.

En todos los casos se necesita la concurrencia de una manifestación pública específica de voluntad de acceder a la autonomía en el Estado, para que se actualicen las condiciones previas legales al efecto y pueda iniciarse formalmente el proceso que coronará con la autonomía reivindicada.

c) Procedimiento para acceder a la autonomía regional o de región con pueblos indígenas numéricamente importantes o mayoritarios en ella

En garantía del procedimiento democrático y de la consulta real y efectiva de la voluntad popular al iniciarse un proceso cuyo fin es el de crear una entidad políticamente autónoma en el territorio de un país deben observarse condiciones y requisitos que aseguren la participación más amplia posible.

i) La solicitud o petición original debe: 1) contar con el respaldo explícito de a) las diputaciones departamentales o provinciales que existan en el territorio que sería el de la nueva entidad, más b) una mayoría calificada de los municipios y comunidades indígenas y no indígenas del mismo que debe alcanzar los dos tercios (o los tres cuartos) de ellos y cuya población constituya la mayoría del censo electoral de cada departamento o provincia y 2) ser ratificada mediante referéndum popular por el voto afirmativo de la mayoría absoluta de los electores de cada uno de los departamentos o provincias.

ii) Tramitación de la solicitud

El trámite formal que se dará a la solicitud incluiría al menos los siguientes pasos indispensables:

1) Elaboración del proyecto de estatuto

El Gobierno estatal convocará a todos los miembros del cuerpo legislativo estatal elegidos en las circunscripciones comprendidas en el ámbito territorial que pretenda acceder al autogobierno, y los de las diputaciones departamentales o provinciales correspondientes para que con los representantes de los municipios y comunidades que alcancen al menos la mitad más uno de los mismos se constituyan en congregación proponente autonómica al solo efecto de elaborar el proyecto de estatuto de autonomía que corresponde, mediante el acuerdo de la mayoría absoluta de sus miembros.

2) Examen del proyecto por una comisión mixta legislativa del cuerpo legislativo estatal, con asistencia de representantes de comunidades indígenas con derecho a voz

Aprobado el proyecto de estatuto, la congregación lo remitirá a la comisión de asuntos y puntos constitucionales del cuerpo legislativo estatal, la cual, dentro del plazo de cuatro a seis meses y junto con las comisiones de comunidades y asuntos indígenas y de derechos humanos del mismo cuerpo legislativo estatal y con el concurso y asistencia de una delegación de 5 a 15 miembros de la congregación proponente, lo examinará para determinar de común acuerdo una formulación definitiva.

A las sesiones de esta comisión mixta del cuerpo legislativo estatal podrán asistir con derecho a voz en ellas, los representantes acreditados por las comunidades indígenas y no indígenas del territorio indicado.

3) Si hay acuerdo en la comisión mixta

Si se alcanzare ese acuerdo, el texto resultante será sometido a referéndum del cuerpo electoral de los departamentos o provincias comprendidos en el ámbito territorial contemplado en el proyecto de estatuto aprobado por el acuerdo.

4) Si hay acuerdo en la comisión mixta con hasta tres puntos concretos de divergencia

Si se alcanzare acuerdo sustancial con hasta tres puntos concretos y precisos de divergencia, el proyecto, presentando las dos alternativas surgidas en el seno de la comisión mixta, será sometido a referéndum en sección separada y con identificación aparte para cada punto de divergencia, con explicitación de esas alternativas, pudiendo votarse afirmativamente sólo una de ellas por cada votante.

5) Si, como resultado del referéndum, se aprueba el proyecto

Si, como resultado del referéndum, el proyecto es aprobado en cada una de las provincias por la mayoría de los votos válidamente emitidos, será elevado al cuerpo legislativo estatal. El pleno de éste (unicameral) o los plenos de cada una de las cámaras (bicameral) decidirá(n) sobre el texto, mediante un voto de ratificación. Aprobado el estatuto, el ejecutivo estatal lo sancionará y lo promulgará como ley.

6) Si la comisión mixta no alcanzare acuerdo

Si, por el contrario, la comisión mixta no alcanzare acuerdo sobre el proyecto de estatuo, se dará a ese proyecto la tramitación como proyecto de ley ante el pleno del legislativo estatal. El texto aprobado por éste será sometido a referéndum del cuerpo electoral de las provincias comprendidas en el ámbito territorial del proyectado estatuto. En el caso de que sea aprobado por la mayoría de los votos válidamente emitidos en cada provincia, procederá su promulgación en los términos del párrafo anterior.

7) Si, como resultado del referéndum, sólo algunas de las provincias afectadas lo aprueban

Si al someterse al referéndum el proyecto de la comisión mixta o el del cuerpo legislativo estatal, no se aprueba el proyecto del caso por una o varias de las provincias afectadas, esto no impedirá la constitución de la comunidad autónoma proyectada entre las restantes que lo aprobaron, si éstas son contiguas entre sí o están conectadas entre sí en alguna extensión de su territorio.

8) Si, como resultado del referéndum, sólo una de las provincias afectadas lo aprueba

Si al someterse al referéndum el proyecto de la comisión mixta o el del cuerpo legislativo estatal sólo una de las provincias del ámbito territorial de la propuesta comunidad autónoma lo vota afirmativamente, se aprobará el proyecto de autonomía para ésta, salvo estipulaciones en contrario contenidas en el propio proyecto.

d) Procedimiento de acceso a la autonomía étnica o de pueblo indígena

1. La solicitud o petición original. Respaldo y ratificación por referéndum

La solicitud o petición original debe: 1) contar con el respaldo explícito de: a) una mayoría calificada del 65% de las comunidades indígenas; b) una mayoría absoluta de los municipios mixtos y c) una mayoría simple de los municipios no indígenas existentes, todos ellos, en el territorio que sería el de la entidad que busca acceder a la autonomía; y 2) ser ratificado mediante referéndum popular por el voto afirmativo de la mayoría absoluta de los electores votantes del territorio ya mencionado. El planteamiento será sencillamente: "Se pronuncia usted a favor de la constitución de... como entidad autónoma"; "Se pronuncia usted en contra de la constitución de... como entidad autónoma".

ii) Tramitación de la solicitud

El trámite formal que se dará a la solicitud incluirá al menos los siguientes pasos:

1) Elección y nombramiento de los negociadores indígenas y estatales. Redacción del documento de bases

El Gobierno estatal convocará a todas las comunidades indígenas del territorio que pretende acceder a la autonomía a elegir de 6 a 10 negociadores indígenas para que, junto con igual número de negociadores que nombrará el mismo Gobierno, discutan y aprueben los temas básicos sobre los que habrá de basarse la redacción del proyecto de estatuto autonómico, el documento de bases. Sesionará con la asistencia y participación de los miembros del cuerpo legislativo estatal y los de las diputaciones provinciales o departamentales elegidos en las circunscripciones comprendidas en el ámbito territorial que pretende acceder a la autonomía. Aprobado el documento de bases, se le dará amplia difusión por tres meses solicitando que en el plazo de seis meses, incluyendo los tres meses mencionados de difusión, se haga comentarios sobre ese documento en los medios de comunicación social y presentándolos a la congregación proponente autonómica.

2) Elaboración del proyecto de estatuto

El documento de bases, con los comentarios hechos por escrito y a través de los medios de comunicación social, grabados y audiovisuales, se considerará por los negociadores indígenas y estatales, los legisladores estatales y

provinciales o departamentales, los representantes de las comunidades indígenas y los representantes elegidos por los municipios y comunidades no indígenas del territorio y se constituirán en congregación proponente autonómica que elaborará el proyecto de estatuto como sola atribución.

3) Examen del proyecto por una comisión mixta de legisladores indígenas y legisladores no indígenas

Aprobado el proyecto de estatuto, la congregación lo remitirá y procederá como se contempla en el punto c) ii) 1) supra, que se aplicará, salvo el plazo dentro del cual se considerará el proyecto a fin de determinar de común acuerdo su redacción definitiva, que será fijada por la comisión mixta entre el mínimo de 3 meses y el máximo de 10 meses. Este plazo podrá ampliarse por el voto unánime de los miembros de la misma.

4) a 9) correspondientes, mutatis mutandis a los puntos 3) a 8) del apartado c) ii) anterior.

6. ¿Qué se logra con la autonomía? 39/

Cabe preguntarse en qué forma se manifiestan los beneficios, ventajas y virtudes de ser entidad autónoma una vez lograda esta autonomía. Sería útil determinar las esferas en que ésta sería eficaz en el proceso de la construcción más cabal de la democracia y como medio de fortalecer el disfrute de los derechos humanos.

Seguidamente se exponen algunos aspectos que aparecen más claros a este respecto, en ámbitos político, sociocultural y económico financiero.

a) Beneficios y virtudes en el ámbito político

La resultante configuración estructural del Estado y la transferencia de poderes a la entidad autónoma conlleva posibilidades más reales y oportunidades más directas y concretas de participación en diversos procesos que incluyen, entre otros:

i) La toma de decisiones, con más peso relativo por ser menor la población pertinente, al aportar su opinión que, con las de los otros votantes de la entidad autónoma, contribuye a formar decisiones como resultado de consultas populares o por integrar organismos o entidades que tradicionalmente desempeñan funciones que entrañan la toma de decisiones de diversos tipos o que han sido instituidas precisamente con ese propósito.

ii) La selección y elaboración de las estrategias y tácticas para enfrentar situaciones e intentar solucionar los problemas y cuestiones de la vida pública que les afectan directamente en su existencia, trabajo y actividades diversas.

iii) La selección libre y periódica, sea en forma directa por elección popular, o bien en forma indirecta por nombramiento que hacen esos representantes elegidos popularmente, de las personas que en el ámbito inmediato de su región o comunidad deben asumir y desempeñar los puestos de dirección y gestión, así como responsabilizarse

personal y directamente de investigar, determinar, elaborar, acrisolar y aplicar tales estrategias, tácticas, planes, programas y políticas de acción.

iv) La realización de trabajos y actividades de significación sociopolítica en su ámbito territorial orientadas a alcanzar las metas y hacer realidad los fines propuestos en beneficio de la comunidad o región.

v) El ejercicio mejor y más cabal del examen, control y fiscalización de las actuaciones concretas de los representantes y funcionarios de la comunidad o región y de la forma en que éstos han concebido y aplicado en la práctica las decisiones, políticas, estrategias y tácticas adoptadas.

Los habitantes de la región y los integrantes de la entidad o comunidad autónoma estarán mejor ubicados para seleccionar a sus representantes o funcionarios y empleados. Asimismo se encuentran en situación más idónea para disminuir la distancia y acercar y estrechar la relación que existe entre el Gobierno y los gobernados y entre la administración y los administrados. Hay allí más proximidad física, sociopolítica, psicológica y cultural con los poderes políticos que están más cercanos y radicados en el ámbito territorial de su actuación que, por cubrir menos territorio, es más compacto y accesible.

b) Ventajas en aspectos socioculturales

Se presentan más claras, entre otras:

i) La posibilidad de vivir más plenamente los valores y tradiciones, costumbres, prácticas y usos que conforman la personalidad etnicocultural y a afianzar el rostro civilizatorio propio de los pueblos indígenas dentro del marco fundamental de su cosmovisión.

ii) La posibilidad más efectiva de mantener, revitalizar, desarrollar y transmitir a las generaciones futuras la propia cultura así como de controlar los procesos respectivos.

iii) La posibilidad de esforzarsse con más dedicación y ahínco a apoyar y fomentar la creación cultural y los procesos de etnogenesis a partir de las propias características diferenciales que conforman su propia identidad etnicocultural, sin descuidar la difusión y el disfrute de otras culturas y, particularmente, de la cultura universal.

iv) La posibilidad más concreta de recuperar la práctica efectiva de las técnicas ancestrales, de rescatar las artes populares y de revigorizar las artesanías.

v) La promoción del uso, estudio y enseñanza del idioma propio, así como su utilización más plena en la vida política y administrativa, y en los medios de comunicación de masas (prensa, radio, televisión), dentro de cuadros bilingües e interculturales. Esto, sin descuidar el idioma oficial y los otros, indígenas y no indígenas que sea pertinente cultivar.

vi) La educación. El establecimiento y desarrollo del sistema educativo basado en idiomas específicos, el propio y el oficial, resulta más simple que hacerlo en varios idiomas además del oficial. En forma similar, el aspecto cultural es también menos complejo; las motivaciones y finalidades son menos complicadas cuando se les escoge desde una visión más homogénea de las cosas. No se descuidará otras culturas ni la cultura universal en la educación.

vii) La sanidad y los servicios médicos y farmacológicos que consistirían, idealmente, en una combinación sui generis de servicios tradicionales y modernos, tanto propios como ajenos. Se respetará más cabalmente desde un trasfondo cultural menos heterogéneo las concepciones y prácticas idóneas en el marco de tradiciones y realidades más concretas.

viii) Las ocupaciones tradicionales (agricultura, pastoreo, caza y recolección, pesca en sus diversas manifestaciones, alfarería, tejidos, comercio, etc.) El ejercicio actual de éstas se hará posible y más fácil si se las concibe con criterios más uniformes y basados en las concepcione, tradiciones y prácticas ancestrales, tal como se las interprete y aplique en la actualidad.

ix) Las formas y medios de superar el desempleo y el subempleo así como el ordenamiento de las políticas de previsión, asistencia y seguridad social.

x) La previsión y el ordenamiento de la producción, el consumo, el comercio y el mercadeo de los productos de la región, en el marco de la economía estatal e internacional.

xi) Las formas y medios de transporte público local, cuyos servicios y modalidades se ajustarán más a las necesidades reales de los usuarios.

xii) La construcción de vivienda y los materiales que en ello se utilizarán. Los planes y programas de construcción de vivienda seguirán más fácilmente los patrones tradicionales de distribución de viviendas -compactos o dispersos- adecuados a las condiciones prevalecientes en la región que son conocidos y apoyados. La disposición interna de los ambientes y servicios ofrecerá menos diversidad por razones económico-culturales. Idealmente se utilizarán los materiales de construcción disponibles localmente que son menos caros y de más fácil acceso allí y por ello preferibles a otros que no están al alcance en la localidad y cuyo uso terminará creando dependencias indeseadas al tenérselos que conseguir en el exterior.

Cabe mencionar a estos respectos que cuando los centros de decisión y de apoyo a la iniciativa cultural están lejos de la realidad vital de los portadores y creadores palpitantes de esa cultura -y quizá en manos de personas o grupos que no la comparten y tienen otras motivaciones y aspiraciones- no se atenderá ni apoyará adecuadamente esas acciones y proyectos. Aún más, se atropellará mucha energía creadora debido a la

indiferencia, la falta de percepción, las concepciones hegemónicas o tendencias discriminatorias y enfoques etnocéntricos de esos sectores.

c) Beneficios económicos

Los servicios públicos de la región autónoma se prestan en ámbitos regionales o locales más compactos, con población más homogénea y con cuadros ecológicos y ambientales conocidos históricamente por los habitantes. Por ello son más eficientes en términos económicos y socioculturales que cuando se cubren espacios de más amplitud, más diversidad humana y ecológica y que involucran cuadros y patrones culturales más complejos y heterogéneos debido a la diversidad que abarcan. Esto permite optimizar a escala más reducida la prestación de servicios públicos de carácter regional o local, de manera que la relación socioeconómica de costo y beneficio resulta más idónea.

Lo mismo acontece con la actividad económica en general, cuya planificación se ajustará más a las necesidades, perspectivas y aspiraciones reales y concretas de los integrantes de la comunidad o región autónoma. Cuando surge o se elabora en esas comunidades o regiones autónomas a su escala es más idónea que cuando se produce y elabora a proporciones más extensas y según criterios a menudo tecnocráticos y globalistas al nivel general del Estado.

En general, resulta menos costoso y más eficaz planear y ejecutar prácticamente todas las actividades mencionadas en las dos secciones precedentes.

Cabe mencionar aquí, también, que la administración de un Estado en el que existen regiomes o comunidades autónomas, no tiene por qué costar más que la del Estado centralista o centralizado.

Por el contrario, al permitir un control más ajustado y pormenorizado de los gastos públicos que se financian con sus impuestos y una fiscalización directa e inmediata de la probidad, honradez, capacidad, así como de la actuación real de sus mandatarios y funcionarios públicos en las entidades autónomas cabe producirse una gestión más económica.

El hecho de existir el Estado o entidad general y una o más entidades autónomas no significa necesariamente que se sumen o añadan los costos de las estructuras administrativas y burocráticas autónomas a las del Estado central o general. Al constituirse la(s) entidad(es) autónoma(s) se divide(n) los gastos globales, separándose en ellos los que corresponden a esa(s) entidad(es) autónoma(s) y los que siguen correspondiendo al ente estatal general y los autonómicos se restan de la cantidad antes global, que se ve así reducida en el importe de los mismos.

En efecto, se divide esos gastos segun las proporciones debidas y conforme a la distribución de poderes y potestades en que se opera la transferencia y se restan.

Los gastos de la entidad autónoma dejan de serlo del Estado general, ya que éstos se reasignan y atribuyen al ente autónomo surgido del central-general.

Todo esto implica necesariamente un manejo riguroso y pormenorizado de los gastos y los costos efectivos de los servicios transferidos, los que ya no figurarán en el presupuesto general del Estado sino en el de la entidad autónoma. Se hace, en esencia, una operación contable. Nada más.

Se debe garantizar que el nivel central general del Estado transfiera al ente autónomo los recursos necesarios y en medida suficiente para sufragar los gastos ocasionados y cubrir totalmente el costo de los servicios y responsabilidades transferidos. Es decir, lo mismo que le costaban al Estado general. Los ingresos antes del Estado son ahora ingresos del ente autónomo, en la misma cuantía y significación económica.

La eficiencia en la prestación de los servicios públicos y la aceptación popular de las administraciones autónomas les permitirá ejercer efectivamente su derecho de crear sus propios impuestos y contribuciones fiscales.

Cabe precisar, para concluir con esta parte, que con gran probabilidad se producirán ahorros debido a la gestión más concentrada de la administración de la comunidad autónoma y la reducción de gastos de control y de coordinación. Esto vendrá a compensar los gastos de los cuerpos legislativos autonómicos que surgen como adicionales a los del cuerpo legislativo general estatal a menos que se subsuman en ellos los gastos de las diputaciones departamentales o provinciales que pudieron haber existido, particularmente en el caso de regiones autónomas pluriprovinciales y que desaparecerán en la nueva entidad.

d) Ventajas en áreas de perspectiva múltiple

Muchas de las áreas mencionadas en este capítulo son pertinentes en aspectos que rebasan las estrechas categorías aquí establecidas. Corresponden a una perspectiva al menos triple (económica-sociocultural-política). Se ha decidido colocar aquí algunas de las áreas que tienen importancia fundamental sin pretender, por ahora, formar con ellas un grupo especial separado. Se lo ha hecho con el propósito de darles la atencón que merecen más allá de las limitaciones compartimentales y sin ninguna intención de hacer una enunciación limitativa a este respecto. Se incluye aquí, en este momento, las siguientes, en las cuales se procederá en mejor forma a:

i) Determinar libremente, y de acuerdo con sus costumbres y tradiciones, lo relativo a la tenencia y control de la tierra y los recursos de la misma, así como su transmisión dentro de la comunidad y a las generaciones futuras.

ii) Disfrutar de un medio ambiente sano y ecológicamente equilibrado que puede garantizarles las mejores condiciones para su pleno desarrollo colectivo e individual en calidad de derecho fundamental. A este respecto podrán, también, velar por que las transferencias de contaminación y perturbaciones ambientales, de cualquier clase que sean, no atenten contra ese derecho y podrán, además, controlar

injerencias de todo tipo así como iniciar acciones orientadas a hacer efectivas las reparaciones e indemnizaciones por daños ocasionados por extraños o desde el exterior y restablecer condiciones más satisfactorias.

iii) Determinar su propio desarrollo económico, integral, endógeno y autónomo, de manera que fortalezca su poder autónomo de decisión y la autosuficiencia para llenar sus necesidades esenciales y obtener y utilizar continuadamente sus propios medios de subsistencia habituales. Proceder a ese respecto, inspirándose a la vez en los valores fundamentales de sus tradiciones y costumbres culturales, sociales, jurídicas y políticas y en su estilo y modo de vida. Controlar injerencias indeseadas y cuidar que no se atropelle ese desarrollo propio al articularlo a planes y programas más amplios de ámbito nacional o internacional, así como gestionar, reclamar y obtener las restituciones y reparaciones del caso.

7. La importancia del principio de solidaridad. La cooperación 40/

a) La solidaridad

La solidaridad de las partes que integran el todo constituye una condición esencial para el funcionamiento democrático y eficiente del Estado.

Para ello el Estado debe velar por el establecimiento de un equilibrio económico, adecuado y justo, entre las diversas partes del territorio.

En España -el Estado de las autonomías- la Constitución de 1978 prevé en su artículo 158 el establecimiento de dos fondos económicos en los presupuestos generales del Estado: el Fondo de Asignación y el de Compensación, de la manera siguiente:

"1. En los Presupuesto Generales del Estado podrá establecerse una asignación a las Comunidades Autónomas en función del volumen de los servicios y actividades estatales que hayan asumido y de la garantía de un nivel mínimo en la prestación de los servicios públicos fundamentales en todo el territorio español.

2. Con el fin de corregir desequilibrios económicos interterritoriales y hacer efectivo el principio de solidaridad se constituirá un Fondo de Compensación con destino a gastos de inversión, cuyos recursos serán distribuidos por las Cortes Generales entre las Comunidades Autónomas y provincias, en su caso."

Se busca emparejar y nivelar situaciones diversas, colocándolas en el mismo plano. La diversidad, las diferencias entre unos y otros entes autónomos cuando hay más de uno, naturalmente dependen de la variedad cultural, lingüistica, religiosa, historica y economica entre las nacionalidades, comunidades y regiones que asumen esa autonomía y entre ellas y lo que reste del Estado central. Se ha de atender diferencias reales y profundamente sentidas por los integrantes de esas entidades autónomas.

Como en estas líneas se trata de formas de la autonomía en el Estado, dentro de él, y no de separatismo ni de independentismo, es importante, sin embargo, que esas mismas diferencias e identidades sean comprendidas y afirmadas por todos -tanto cada una de las entidades autónomas como el Estado por su parte- como formando parte de una unidad distinta, a la vez plural y global, que es el Estado mismo.

Hay un imperativo de solidaridad. Este es imperativo político y social y dentro de marcos de respeto a las diferencias y basado en la igualdad de derechos, solidaria entre las distintas entidades vertebradas en el Estado. La solidaridad se manifiesta entre iguales, es decir entre las entidades autónomas y entre los miembros de las mismas.

b) La cooperación

Como secuela de la solidaridad se impone la cooperación en ciertas circunstancias. Los ámbitos de entidades autónomas limítrofes a menudo plantean cuestiones que deben abordarse en común y conjuntamente por las mismas. La solución unilateral y egocéntrica por parte de una sola de ellas, o grupo no completo de las mismas, puede ocasionar pérdidas, costos elevados innecesarios. Estos problemas de frontera o de borde exigen un planteamiento y una solución conjunta para beneficio de todos.

Toma pleno cuerpo en este contexto la idea de la solidaridad traducida en cooperación específica para los casos apuntados. Se ha de prever y determinar de antemano las circunstancias que lo exijan, los requisitos sobre los que se asentará la cooperación y los términos, formas y condiciones de los convenios posibles entre entidades limítrofes para la concepción, gestión y la prestación de los servicios necesarios.

Ha de buscarse que presida todos esos esfuerzos el trinomio autonomía-solidaridad-cooperación.

B. Medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones indígenas autónomas

a) Observaciones iniciales

Según un estudio de la Secretaría General de las Naciones Unidas el "derecho a la participación popular" no ha sido aún incorporado al derecho internacional público como derecho reconocido per se. Hay, sin embargo, elementos de la esencia del mismo que sí figuran explícitamente en varias disposiciones dispersas en los textos de los instrumentos internacionales de derechos humanos 41/.

Ha surgido como tema específico en el contexto de la necesidad de consultar a los que se ven más afectados por los planes nacionales de desarrollo, en general los pobres de las áreas rurales 42/. La Declaración

sobre el derecho al desarrollo, de 1986, contiene una disposición en la que se usa precisamente esas palabras, así:

> "Los Estados deben alentar la participación popular en todas las esferas como factor importante para el desarrollo y para la realización de todos los derechos humanos" (art. 8, párr. 2, el subrayado es nuestro) 43/.

Es claro que la efectiva participación del pueblo en los procesos de toma de decisión política y económica no sólo se ve asegurada a través de la efectividad del ejercicio de otros derechos y libertades sino que hay una verdadera interdependencia entre todos esos derechos y libertades. No hay desarrollo si no hay efectividad de goce y de ejercicio de otros derechos y esos derechos no se ejercerán plenamente sin desarrollo y sin el dinamismo, el cambio y la renovación necesaria en la vida en sociedad y de la sociedad misma.

La participación popular consiste, pues, en que todos los sectores que componen la sociedad tengan el derecho y la posibilidad de participar en los procesos de toma de decisiones políticas, económicas y socioculturales y, además, que se les dé efectivamente la oportunidad de hacerlo en la forma más amplia posible.

En el ya mencionado estudio de la Secretaría General de las Naciones Unidas se hace notar la importancia de no reprimir la expresión y difusión de las opiniones divergentes de los grupos minoritarios en aras a no afectar el dinamismo de la sociedad y el cambio y la renovación de la vida en sociedad. En él se asienta una conceptuación de la participación popular como la participación de los ciudadanos en los asuntos públicos con pleno respeto a los derechos humanos sin discriminaciones de ninguna especie y dando atención especial a los grupos a los que hasta ahora se ha dejado fuera de una participación genuina 44/.

Ambos aspectos tienen particular relevancia en relación con los pueblos indígenas. Efectivamente éstos han sido constantemente marginados de una participación real, desde su propia identidad y en función de la misma, en los procesos de toma de decisión que afectan a la vida económica y política del país.

Por ello buscan la autonomía como una de las formas de la libre determinación a fin de salir de esa situación sin tener que abandonar ni negar su propia identidad y poder, al nivel de sus comunidades y en sus territorios, avanzar el desarrollo tal como ellos lo conciben, en forma diferente del concepto de otros segmentos de la sociedad global, con metas propias en el contexto de su cosmovisión, su estilo de vida y sus costumbres y tradiciones a la vez que articulado el desarrollo general del país. Lo que debe examinarse aquí, según el título del tema, son los arreglos que se pueden hacer para asegurar la participación popular y el goce y ejercicio efectivos de los derechos humanos por parte de las instituciones autonómicas indígenas.

Entrando al tema específico de los medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones

indígenas, vale decir de entrada que las costumbres y tradiciones indígenas en todas partes se ajustan sin dificultad a esos requisitos.

Es natural inclinación y práctica inveterada de los pueblos indígenas actuar en la gestión de los asuntos públicos con participación de la comunidad entera y con respeto a los derechos varios de todos los participantes en la vida comunitria. Aquélla (la participación popular) se manifiesta a través de formas participativas, tanto directas (congresos generales y asambleas y reuniones multitudinarias) como indirectas (por vía de representantes, funcionarios y mandatarios) y éste (el respeto de los derechos) en amplia oportunidad de expresar opiniones y pareceres que se toman debidamente en cuenta y en los esfuerzos siempre presentes por sustentar la toma de decisiones en formas de consenso en las que no se atropella a nadie.

Se ha dicho ya que la nueva estructuración del Estado no debe originarse en decisiones impuestas burocrática y arbitrariamente ni contener fórmulas antojadizas de los poderes centrales. No debe surgir de decisiones caprichosas del ejecutivo ni de invenciones arbitrarias del legislativo estatal central.

Debe, por el contrario, reflejar las fórmulas propias reivindicadas por cada entidad autónoma como medio para recobrar sus tradiciones culturales, sociales, económicas y políticas, acceder al autogobierno y retomar la realización de su proyecto histórico como pueblo.

La autonomía regional implica la descentralización y la democratización del Estado. Significa, en verdad, una profundización de la democracia y la participación popular ya que acerca los niveles de toma y de ejecución de decisiones a los ciudadanos, permitiendo esa participación más profunda, más inmediata y directa y más constante.

En efecto, como se ha visto en la parte A, la participación popular tiene 1) más peso relativo en la toma de decisiones debido a la menor población y a la inmediación; y 2) tiene posibilidades más reales, directas y concretas de influir en a) la selección y elaboración de las estrategias y tácticas para intentar solucionar problemas y cuestiones de la vida pública; b) la selección libre y periódica directamente por elección popular de sus representantes y la selección indirecta de los funcionarios designados por sus representantes elegidos directamente; c) la realización más completa de trabajos y actividades de significación sociopolítica en su ámbito territorial autonómico y d) el ejercicio mejor y más cabal del examen, control y fiscalización de las actuaciones concretas de funcionarios y representantes. Dicho en pocas palabras, disminuye la distancia entre gobernantes y gobernados y entre administradores y administrados. Los acerca más a los fines de la selección y control de los gobernantes y administradores por el gobernado y administrado.

Mención especial merece la toma de decisiones directamente por el pueblo al participar en consultas populares en forma de referéndum, plebiscito y otras que se mencionarán más adelante. También hay participación directa en

la iniciativa popular ante el legislativo autonómico que debe instituirse a fin de hacer posible que el pueblo mismo lleve sus inquietudes al seno del cuerpo representativo que hace leyes.

En el aspecto sociocultural, da oportunidad de vivir más plenamente los valores y principios así como las tradiciones, costumbres y prácticas propias en comunidad, de hablar, estudiar, perfeccionar y desarrollar más el idioma, el control y la tenencia y disfrute de las tierras y los recursos, de dar los giros deseados a la educación y a los servicios sanitarios, médicos y farmacológicos; de revitalizar y ejercer intensamente las ocupaciones tradicionales y tantas otras áreas de gran interés y significación.

En la esfera económica se interviene directamente para que los servicios públicos y la actividad económica en general se ajusten más y mejor a las necesidades reales de los pobladores y usuarios locales.

Habrá determinación más fácil de alcanzar en el mantenimiento y perfeccionamiento del propio desarrollo económico, según su propia concepción del mismo como endógeno y autónomo que fortalezca el poder autónomo de decisión. También se podrá proceder más resueltamente a su protección frente a otras formas de desarrollo y ante la penetración abusiva de intereses y entidades extraños y el rechazo de estos últimos.

En diversas secciones de la parte A de esta nota se ha señalado ya varios aspectos en los que el establecimiento y el funcionamiento de la autonomía implica la participación necesaria de grandes sectores de la población de la región autónoma y del país en general.

b) Participación popular al institucionalizar la autonomía en la Constitución

Se presentan modos e instancias de participación popular bien caracterizados, aun antes de que quede formalmente establecida la autonomía institucional en casos concretos.

Si, como se supone, la asamblea constituyente ha estado compuesta de representantes elegidos mediante sufragio universal, libre, igual, directo y secreto, y que en la elección han participado grandes sectores del cuerpo electoral del país, el texto constitucional en el que se institucionaliza la autonomía es resultado de la participación popular indirecta a través de sus representantes.

Esto constituye entonces la primera oportunidad de participación popular en relación con la autonomía, esto es, al introducir esa institución al derecho constitucional del país.

En el proceso de la producción de la constitución puede haberse presentado una oportunidad más de participacion popular, directa esta vez, si como no es inusitado el texto constitucional que contiene innovaciones importantes es sometido a referéndum para su ratificación popular.

c) Participación popular en el proceso de iniciativa y de acceso a la autonomía en casos concretos

Se presentan formas de participación directa (por el pueblo en sí) e indirectas (por medio de representantes):

Participación directa del pueblo. Presentada la iniciativa autonómica se suele celebrar un plebiscito o referéndum para que el pueblo del territorio que será el de la nueva entidad se pronuncie en favor o en contra de la iniciativa de acceso a la autonomía. En esta consulta pueden plantearse interrogantes acerca del alcance y contenido de la autonomía buscada o de aspectos de la negociación que habrá de realizarse.

Participación indirecta. Representantes. Al presentarse la iniciativa deben intervenir los miembros de las diputaciones departamentales o provinciales, los de las corporaciones municipales y los representantes de las comunidades de territorio que será el de la nueva entidad.

Para la redacción del proyecto de estatuto se agregarán a ellos los miembros del cuerpo legislativo estatal que hayan sido elegidos en el territorio que será el de la nueva entidad que, con los demás, integrarán la congregación proponente autonómica.

d) Participación popular durante la existencia y el ejercicio de la autonomía

Como se ha señalado antes, la misma autonomía al funcionar reclama la intervención popular sea en forma directa -en asambleas populares- o indirecta -a través de su cuerpo legislativo autonómico, a través del titular del ejecutivo autonómico, sea éste uni o pluripersonal, de carácter presidencialista, parlamentario, semiparlamentario u otro.

i. Formas directas e indirectas previstas o establecidas

1) Directa. Asambleas populares, congresos generales para discutir orientación política con selección de las opciones abiertas a su consideración.

Elección de representantes diversos y de ciertos jueces (si es el caso).

2) Indirecta. Actuación de legisladores.

Actuación de Presidente (sistema presidencialista).

Elección de segundo grado: funcionarios elegidos por representantes legisladores.

Todo funcionario designado por representante de elección popular.

Jueces en general.

e) Formas de participación popular directa que convendría agregar a las ya existentes

Se ha dicho al empezar a tratar lo relativo a la participación popular y el respeto a los derechos de todos, supra, que es natural inclinación y costumbre inveterada de los pueblos indígenas incluir ambos elementos en su gestión de los asuntos públicos. En el capítulo 5 de la parte A y en la sección a) de esta parte B de la presente nota se ha hecho referencia a varias de las formas que adoptan esa participación y ese respeto en la comunidad autonómica indígena. Se desea, sin embargo, sugerir algunas normas adicionales que, actuando siempre con respeto a las costumbres y tradiciones indígenas y en función de las mismas, podrían venir a completar un poco más el cuadro respectivo en lo relativo a la participación directa.

i) El plebiscito para plantear modificaciones importantes al estatuto autonómico y otros planteamientos de crucial importancia.

ii) La iniciativa popular ante el legislativo autonómico.

iii) La petición popular ante funcionarios del ejecutivo autonómico.

iv) La acción popular (actio popularis) para denunciar violaciones de las instituciones autonómicas.

v) El referéndum. Convendría conservarlo en todas sus funciones ya mencionadas pero agregarle otras, vgr. para obtener la ratificación de modificaciones ya sancionadas por las autoridades competentes autonómicas, del Estatuto y de las leyes autonómicas.

vi) El recall. Convendría instituirlo como facultad que el pueblo se reserve o que se establezca en ciertas áreas y ámbitos para que, en circunstancias estipuladas taxativamente en el Estatuto Autonómico, pueda destituir a funcionarios públicos o representantes suyos por el voto del pueblo, antes de que termine el período de su elección o designación. Asimismo para dejar sin efecto su actuación en el cargo, así como para revocar las resoluciones de unos y otros. Al efecto se ha de presentar una solicitud con ese propósito respaldada por la firma del número requerido de miembros de la comunidad, si consideran que su actuación en el desempeño del cargo o sus resoluciones, o ambas, a) son contrarias al interés general de la comunidad autónoma, b) se subordinan a intereses o motivaciones no legítimos en su actuación o resoluciones, o c) proceden en ella con abuso o desviación de poder, dañino a la comunidad.

f) La participación popular lleva el ingrediente de respeto por los derechos humanos de todos

Este ingrediente está presente también en la autonomía misma al actualizarse la posibilidad del ejercicio más efectivo y real, tanto de los derechos como de las libertades fundamentales individuales, como también los derechos y libertades colectivos y los derechos históricos y específicos de los pueblos indígenas como tales, que son derechos colectivos esencialmente.

Así cabe tener por posibilitado en mejor forma el ejercicio de:

El derecho a la propia vida cultural

El derecho a profesar y practicar su propia religión

El derecho a emplear su propio idioma

El derecho a las formas de tenencia de la tierra y de los recuros y el control, uso y transmisión de los mismos según normas tradicionales; etc.

g) Funcionarios que velen por la efectividad de los derechos y libertades

Para asegurar el pleno disfrute y ejercicio efectivo y mejor protección de los derechos y libertades se podría crear figuras como:

i) El Procurador autonómico de derechos humanos;

ii) El Procurador autonómico de derechos históricos y específicos de los pueblos indígenas de la comunidad autónoma;

iii) Otras figuras compatibles con las tradiciones indígenas al respecto, si las hubiere.

h) La educación en materia de derechos humanos y la capacitación popular para la defensa de los mismos

Es de gran importancia que la educación, además de sus propósitos y fines consabidos, se oriente a difundir el conocimiento y la comprensión de esos derechos y a capacitar a todos los habitantes de la comunidad autónoma indígena para la defensa de sus derechos individuales y colectivos. Al efecto:

i) Proporcionará el conocimiento sistemático de la Constitución y los instrumentos internacionales de derechos humanos, en particular los ratificados.

ii) Fomentará el respeto de los derechos humanos y libertades fundamentales de todos y la comprensión, la tolerancia y la amistad entre todos los pueblos, comunidades y grupos étnicos, lingüísticos, culturales y religiosos.

iii) Promoverá activamente la capacitación, por medio de la información, el análisis y los ejercicios prácticos, en materia de la defensa de sus derechos individuales y colectivos en el seno de la sociedad global, de manera que puedan superar los factores limitantes que afectan su desarrollo en forma de dominación hegemónica, discriminación generalizada, explotación económica, opresión étnica y represión diversa.

iv) Pondrá el necesario énfasis en el respeto y la protección de los derechos de los no indígenas que vivan en el territorio indígena de la comunidad autónoma.

v) Reforzará la vocación al mantenimiento de la paz, a la realización del derecho al desarrollo endógeno y a un orden social y económico justo y equitativo, y a la vital recuperación y conservación de un medio ambiente o entorno sano y del equilibrio ecológico, en que tan sabiamente sobresalieron las antiguas generaciones indígenas.

vi) Impartirá, con base en todo lo anterior y en las costumbres y tradiciones indígenas, la instrucción cívica y la formación social del educando.

Observaciones finales

La autonomía de la que se trata en el presente trabajo es una institución política que entraña necesariamente un proceso de distribución y de descentralización de poderes públicos. Para conformar su concepto no basta reconocer la existencia de esos pueblos indígenas y hacer arreglos de descentralización administrativa. Se necesita ir más allá y reconocerles el derecho de autogobernarse como entidades autónomas dentro del Estado, con separación de competencias entre las de las autoridades estatales y las de las autonómicas. Se necesita también concomitantemente, y de manera crucial abandonar actitudes y políticas negadoras de la especificidad indígena, repudiadas históricamente por esos pueblos que han reafirmado siempre su identidad y su dignidad de pueblos libres y diferenciados dentro de la sociedad global.

De otra manera, puede muy bien darse la autonomía regional con potestades legislativa, ejecutiva y judicial o jurisdiccional en el seno de un Estado, en otros aspectos aceptablemente democrático y autonómico, sin que la situación de colonización de los pueblos indígenas sea superada. Es decir, se puede reproducir, a escala más reducida, el cuadro -no necesariamente mejorado en lo sustancial- de imposición y opresión que se trata de superar.

Los pueblos indígenas no sólo cuestionan el centralismo estatal sino rechazan su asimilacionismo y las circunstancias que permiten a la sociedad global o a sectores importantes de la misma, imponerles la dominación hegemónica, con discriminación generalizada, explotación económica y opresión étnica. La sociedad que reprime sus reivindicaciones históricas y específicas como amenazas a la seguridad nacional habrá de experimentar cambios sustanciales que le permitan comprender los arreglos equitativos y profundamente distintos que conlleva la distribución en centros de poder político distintos del estatal central, pero dentro de una nueva estructura de la sociedad y del Estado.

Para los pueblos indígenas no se trata solamente de la obtención de una autonomía regional, de cualquier autonomía regional. Como proyecto de emancipación étnica, la autonomía ha de incluir para los pueblos indígenas, como para cada pueblo diferenciado dentro del Estado, el derecho igual a existir como tales, es decir, como pueblos, con su identidad y su cosmovisión, con lengua, cultura y organización social propias y asentamiento en su territorio ancestral.

Deben ser ellos mismos, los pueblos indígenas, quienes solucionen y superen, a su manera, los problemas que confrontan en el seno de la sociedad global indiferenciada y concebida desde parámetros extraños a los indígenas. Por eso se requiere indispensablemente que, en su caso, la autonomía sea autonomía indígena.

Pero no con hegemonía y etnocentrismo agresivos. No para oprimir ellos, esta vez. Se trata de hacer posible un arreglo regional armónico y en función de los intereses reales de toda la población regional. Se aspira a lograr una autonomía regional pluriétnica de una región territorial indígena, que garantice sus derechos a todos los grupos que componen la población regional. Se necesita, sin embargo, repito, que sea una autonomía regional indígena.

Por ello, los esfuerzos han de concentrarse en el acceso a la autonomía de los territorios indígenas y para construir un proyecto de autonomía indígena.

Esta autonomía no va orientada ni está dirigida contra los no indígenas que habitan el territorio. El Estatuto de Autonomía territorial indígena debe tomar debida cuenta de la realidad pluriétnica que exista en la región. La autonomía de la que se trata debe beneficiar significativamente al conjunto de la poblacion del territorio que accede a la autonomía.

En nuestros días se habla mucho de la necesidad de "construir la democracia" y de la "democratización de las sociedades" en los Estados actuales, de manera que ésta alcance a todos los sectores, en particular los entes marginados. En el caso de los países pluriétnicos, debe tratarse, sin embargo, no sólo de la construcción de un Estado democrático, de una sociedad democrática, que bien podría lograrse en lo sustancial, sin resolver realmente los problemas que confrontan los pueblos indígenas que en ellos viven.

Para tomar el camino de esa democratización a niveles más reales y profundos en esos países habría que empezar, cabe repetirlo una vez más, por rechazar y abandonar totalmente las políticas integracionistas-asimilacionistas. Haría falta también promover la toma de medidas especiales para crear las condiciones que hagan posible a los pueblos indígenas gozar de plena igualdad de derechos como pueblos con el otro pueblo o los otros pueblos que existan en el seno de la sociedad global del país respectivo, lo que muchos Estados en nuestros días proclaman tener la firme y determinada intención de lograr.

Habida cuenta, entonces, de la declarada voluntad política en varios países de hacer justicia a los pueblos indígenas después de varios siglos de negación de su identidad étnica y de frecuente represión ante los intentos de reivindicar sus derechos históricos y específicos. Dada la presencia continuada de los pueblos y comunidades indígenas en sus territorios ancestrales milenarios, donde aún conservan alguna parte de los mismos en medida significativa. Vista la constante reivindicación y reafirmación de su identidad étnica frente a todo esto. A la luz de la explícita voluntad colectiva de realizar sus propios proyectos históricos como pueblos, se impone la percepción de que una de las vías más obvias para apuntar a buen fin, es el acceso de los pueblos indígenas a la autonomía política dentro de los Estados,

ya que, además, ésta es una de las vías escogidas por ellos en esta coyuntura histórica de la proximidad del inicio del siglo XXI, a más de 500 años de la invasión y la agresión que inició el doloroso camino de la colonización.

La estructuración del Estado con pluralidad de centros dotados de poder político debe obedecer fundamentalmente a criterios de respeto debido a esas características, anhelos y reivindicaciones. Se modificará así la estructura unitaria centralizada que no les da este espacio democrático y de justicia histórica, así como también las estructuras federales en las que no se ha querido o sabido dar lugar a este tipo de autonomía política indígena -y eso dentro de un Estado concebido básicamente como agregación de espacios con poder político autónomo.

Notas

1/ Los párrafos que aparecen en esta sección son tomados, con ligeras modificaciones, de Willemsen Díaz, Augusto "Derechos indígenas. Aporte al plenario", presentado al Seminario de Sisoguichi, Territorio Tarahumara, Chihuahua, en enero de 1989, en Talleres de derecho alternativo - México, D.F., Sisoguichi, Tehuantepec. ILSA, Asociación Interamericana de Servicios Legales, Documento - 2, 1989. Bogotá, Colombia, 1989, págs. 36 y 36.

2/ A principios del siglo pasado, los países latinoamericanos -iberoamericanos e indoibéricos (a los que se ha tenido particularmente en mente)- se constituyeron en Estados-nación después de su emancipación política de España y Portugal. Se inspiraron al efecto en ideas de la Revolución Francesa y concibieron a los nuevos Estados como entidades de corte occidental y como formados por poblaciones uniformes e indistintas, constitutivas de una nación única. Esto, desde luego, estaba en contradicción directa de la realidad en muchos de ellos, donde a la par de la población criolla y mestiza existían -a veces formando la inmensa mayoría de la población- pueblos indígenas con su cosmovisión, su identidad étnica y formas de organización interna y costumbres, tradiciones y prácticas propias.

3/ Artículo 1, párrafo 2 de la "Declaración sobre la raza y los prejuicios raciales" aprobada por la Conferencia General de la UNESCO en su vigésima reunión, París, 27 de noviembre de 1978. Publicación de la UNESCO con el mismo título Declaración sobre la raza y los prejuicios raciales, que contiene además como anexos las cuatro declaraciones preparadas en 1950, 1951, 1964 y 1967 por expertos reunidos por UNESCO a título individual. París, 1979, págs. 9 a 18.

4/ Sea en su forma actual de Estado soberano e independiente (caso de Chile y de los mapuche) o bien cuando eran territorios dependientes de otras potencias y que fueron retenidos al constituirse como Estados independientes (caso general).

5/ Las constituciones en varios países contienen disposiciones que implícita o explícitamente reconocen esas características. Entre éstas cabe mencionar como más claras al respecto, al menos las constituciones hoy vigentes en Bolivia, Brasil, Colombia, Guatemala, Nicaragua, Panamá y Perú.

6/ En México se ha tenido recientemente en estudio una reforma constitucional que contempla esa materia (reformas al artículo 4). No se tiene claridad acerca del estado de este proceso.

7/ Mención aparte merece Argentina con su Constitución federal de 1853, reformada que no favorece la identidad indígena y varias constituciones estatales ("provinciales") algunas de las cuales sí disponen en sentido favorable. En efecto, ese reconocimiento constitucional figura como principio en la plataforma política de varios movimientos indígenas. Es punto fundamental en los planteamientos de la Confederación Nacional Indígena del Ecuador (CONAIE).

8/ Vgr. Argentina, Ley Federal N° 23.302 de 1985; Colombia, Ley 89 de 1890; Paraguay, Ley N° 904 de 1981, etc.

9/ Willemsen Díaz, Augusto. Texto redactado en marzo de 1991 para entregar a una organización. Aún no publicado.

10/ Ibid.

11/ Los párrafos colocados bajo este título se basan primodialmente en Willemsen Díaz, Augusto, "Los derechos culturales de los pueblos indígenas", contribución a un grupo de discusión durante el Seminario Internacional sobre la Educación para la comprensión internacional y la paz organizado por la Asociación Guatemalteca pro Naciones Unidas con el patrocinio de la UNESCO, et. al., Guatemala, Guatemala 23 a 25 de agosto de 1989. Publicado más tarde, asignándole el título de "Derechos culturales e integración", en Estudios Internacionales, Revista del Instituto de Relaciones Internacionales y de Investigación para la Paz, Año 1, N° 2 (julio a diciembre de 1990), Guatemala, Guatemala C.A., 1991, págs. 107 a 112.

12/ UNESCO Recomendación sobre la educación para la comprensión, la cooperación y la paz internacionales y la educación relativa a los derechos humanos y las libertades fundamentales.

13/ Texto de la Carta en: Naciones Unidas, Servicios de Información Pública, Carta de las Naciones Unidas y Estatuto de la Corte Internacional de Justicia, Nueva York.

14/ Naciones Unidas, Centro de Derechos Humanos, Recopilación de instrumentos internacionales. Publicación de las Naciones Unidas, N° de venta: S.88.XIV.1, Nueva York, 1988, págs. 46 a 48.

15/ Citada por Cristecu, Aureliu, en Naciones Unidas, El derecho a la libre determinación. Desarrollo histórico y actual sobre la base de los instrumentos de las Naciones Unidas. Preparado en calidad de Relator Especial de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Publicación de las Naciones Unidas, N° de venta: S.80.XIV, págs. 15 y 16, párr. 73.

16/ Gros Espiell, Héctor, en Naciones Unidas, El derecho a la libre determinación. Aplicación de las resoluciones de las Naciones Unidas. Preparado en calidad de Relator Especial de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Publicación de las Naciones Unidas, N° de venta: 8.79.XIV.5, Nueva York, 1979, párr. 59.

17/ Martínez Cobo, José R., Naciones Unidas, Estudio sobre el problema de la discriminación contra las poblaciones indígenas. Preparado en calidad de Relator Especial de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Publicación de las Naciones Unidas, N° de venta: S.88.XIV.3, Nueva York, párrs. 269 a 279 y 580 y 581.

18/ Se redactó "estructuras politicoadministrativas", pero a fin de cuentas apareció sólo como "estructuras administrativas". Con esto se le privó de una de las principales características de la autonomía, la política, a la que, inter alia, se refiere la presente nota.

19/ Naciones Unidas, Derechos Humanos. Recopilación de instrumentos internacionales, op. cit., págs. 8 y 19.

20/ Citado por Cristescu, Aureliu, op. cit., párr. 73.

21/ Gros Espiell, Héctor, op. cit., párr. 60.

22/ Gros Espiell, Héctor, op. cit., párr. 89.

23/ Conclusiones adoptadas por el Simposio Internacional de Expertos sobre el tema "Derechos de solidaridad y derechos de los pueblos", celebrado a invitación de la República de San Marino y con la ayuda de la UNESCO, en la República de San Marino, 4 a 8 de octubre de 1982 en: Mosca, Juan José y Pérez Aguirre, Luis. Derechos Humanos. Pautas para una educación liberadora, Ediciones Trilce, Montevideo, Uruguay, diciembre de 1986, págs. 171 a 178. Párrafo 18, en página 174.

24/ Texto de la Declaración Universal de los Derechos de los Pueblos, también conocida como "Declaración de Argel", adoptada en una reunión internacional no gubernamental en Argel en 1976 en: Comisión para la Defensa de los Derechos Humanos en Centroamérica (CODEHUCA), Secretariado Permanente. Declaración Universal de los Derechos de los Pueblos, folleto de nueve hojas, sin fecha.

25/ Ibid., pág. 8.

26/ Hannum, Hurst. Autonomy, Sovereignty and Self Determination. The Accomodation of Conflicting Rights. University of Pennsylvania Press, Filadelfia, 1990, pág. 116.

27/ Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO). Texto de la Declaración de San José adoptado por aclamación el 11 de diciembre de 1981 como resultado de la Reunión de expertos sobre etnocidio y etnodesarrollo en América Latina, convocada por la UNESCO y la Facultad Latinoamericana de Ciencias Sociales (FLACSO), La Catalina, Santa Bárbara de Heredia, Costa Rica, del 6 al 13 de diciembre de 1981. Aparece en anexo VI al capítulo II, Medidas tomadas por los organismos especializados. Naciones Unidas, Estudio sobre el problema de la discriminación contra las poblaciones indígenas, anexo VI al capítulo II, incorporado después en el volumen I, con los capítulos I, III y IV del mismo de la compilación en cinco volúmenes marcada con la sigla E/CN.4/Sub.2/1986/7, págs. 132 a 134.

28/ Esta parte de la Declaración de San José se basa directa y deliberadamente en los términos usados en el párrafo tercero de la Declaración Universal de Derechos Humanos.

29/ UNESCO, loc. cit., pág. 133.

30/ Hannum, Hurst, op. cit., pág. 116.

31/ Texto de la Declaración en: CODEHUCA, op. cit., pág. 4.

32/ Ibid., pág. 7.

33/ Texto de la Declaración en: Mosca y Pérez Aguirre, loc. cit., pág. 173.

34/ Naciones Unidas, Estudio del problema..., op. cit., pág. 132.

35/ Willemsen Díaz, A., Contribución al plenario, op. cit., pág. 36.

36/ Mucho del contenido de los capítulos 3 a 7 se basa en ideas expresadas en anteriores trabajos preparados por el autor de la presente nota, Willemsen Díaz, Augusto, entre los cuales cabe al menos destacar: 1) Legisladores indígenas, legislación y políticas que afectan a los pueblos y comunidades indígenas. Documento preparado a instancia y petición del Instituto Indigenista Interamericano y presentado al Primer Encuentro de Parlamentarios Indígenas de América Latina, Panamá, Panamá, 26 a 29 de agosto de 1987 y 2) Análisis crítico del proyecto de ley de creación de la comarca Guaymí en la República de Panamá, Panamá, agosto de 1987. Se apoya también significativamente en materias expuestas en dos libros: P. Sunyer, C. Viver, Conocimiento de la Constitución, editorial Vicens Vives, Barcelona, España, 1987 y en Larroque, Luis, Comunidades autónomas, editorial Popular, sin fecha.

37/ El mencionado estudio especial de la Secretaría General de las Naciones Unidas, preparado a pedido de la Comisión de Derechos Humanos en su resolución 1883/14 y presentado a la Comisión en 1984, después de examinar los diversos aspectos del mismo, concluyó que el derecho a la participación popular per se y en sus términos más generales no parece estar establecido expresamente en instrumentos universales con fuerza jurídica vinculante. También concluye, sin embargo, que numerosos textos internacionales de variada naturaleza jurídica contienen elementos de la participación popular y algunos de esos textos llegan a enunciar un derecho global a la participación. Ver Hannum, Hurst, op. cit., págs. 113 a 118. En particular en págs. 113 y 114.

38/ Véase la nota 36, supra.

39/ Ibid.

40/ Ibid.

41/ Ibid.

42/ Véase por ejemplo Naciones Unidas, Popular Participation in Decision Making for Development, United Nations publication, Sales N° E.75.IV.10. Como publicación posterior véase también Naciones Unidas Popular Participation as a Strategy for Promoting Community level and National Development, United Nations publication, Sales N° E.81.IV.2.

43/ Adoptada por la Asamblea General de las Naciones Unidas en su resolución 41/128 de 4 de diciembre de 1986 en Naciones Unidas, Derechos Humanos. Recopilación de instrumentos internacionales, op. cit., págs. 404 a 409. En particular pág. 408.

44/ Citado por Hannum, Hurst, op. cit., págs. 113, 114 y 115.

Fiscal and administrative relations between indigenous governments and States

Background paper prepared by
Ponciano L. Bennagen

Over the years, the worldwide struggles of indigenous peoples for the right to self-determination have made concrete gains, particularly in the area of self-governance and of the rights to land and natural resources. In an increasing number of countries, these rights are being enshrined in their Constitutions. However, there exist continuing violations of indigenous peoples' rights and a lack of political will of States or national Governments to push through with appropriate legislation and development programmes. Self-governance and fiscal autonomy remain to be fully realized. In some countries initial gains have been nullified by subsequent legislation. Clearly, the gap between constitutional and statutory rights on the one hand, and the continuing violation of indigenous peoples' rights on the other, underscore the urgent need to examine the complex conditions that either favour or obstruct the protection and enjoyment of constitutional and statutory rights, let alone of human rights in the various instruments of the United Nations. In this brief background paper, we will focus on the fiscal and administrative relations between indigenous governments and the State as represented by the central or national Government. Specific concerns are structures and processes involving the following:

(a) Responsibility-sharing, consultation and cooperation, and dispute or conflict resolutions; and

(b) Resource-sharing, development planning and management.

In a study of this nature, it would be highly instructive to survey a broad range of country experiences to enable us to make empirically-grounded generalizations that could prove useful in the task of setting international standards for the recognition, protection and enjoyment of indigenous peoples' rights. This presupposes that the Constitutions governing the national experiences have been democratically promulgated and that indigenous peoples themselves, along with other groups, have actively participated in the exercise. As such, we can assume that the Constitution could already provide a substantive basis for the further elaboration of international instruments. For lack of time and resources, this could not be done (but it is hoped that the meeting itself will provide ample opportunities for cross-country comparisons).

Note: The opinions expressed in this paper are those of the author.

At this stage of the worldwide movement for self-determination of indigenous peoples, certain over-arching values have crystallized to serve as standards for evaluating existing powers and responsibilities, as well as structures and processes. Among them are territorial autonomy and sovereignty, democracy and justice, equity and cultural freedom. Interestingly enough, these are already found, in one form or another, in existing United Nations instruments on human rights and in some cases, in Constitutions and national laws.

Operationally, they include the following:

(a) Control of territory (expressed variously as ancestral domain, ancestral homeland, indigenous territory, etc.) and its natural resources, both surface and subsurface;

(b) Legislative, executive and judicial bodies, to include corresponding indigenous institutions;

(c) Proper actual representation of the indigenous cultural communities in the various organs of power, not only in the autonomous territorial unit but also in the national Government;

(d) Fiscal autonomy, including power to raise revenues, a just share of national revenues and a capable fiscal administration; and

(e) Respect, protection and development of indigenous cultures.

We shall try to take these into account whenever the available literature allows. In addition, we shall also take into account trends in public development and administration 1/ which parallel the trends in indigenous peoples' struggles for self-determination and are therefore complementary and supportive:

(a) Geographical, instead of sectoral, focus in the delivery of goods and services, which means that one office or agency assumes responsibility over a wide range of related functions instead of a single-function national department or ministry, branching out into local government units.

(b) Decentralization, which means the substantial devolution of powers and responsibilities from central Government to local governments; this would also include recognition and use of indigenous political and administrative institutions such as the Council of Chiefs/Elders;

(c) Movement away from a top- or centre-oriented bureaucracy towards greater people's participation in decision making and development management;

(d) Increasing concern for such values as equity and social justice and not merely for administrative effectiveness and efficiency.

Self-determination: full integration or full independence?

In the context of self-determination, the options open to indigenous peoples are: (a) full integration into the national society; (b) territorial autonomy within the territorial integrity of the States; and, (c) full national independence or secession. The trends seem to be towards some territorial autonomy which could lead to full national independence if basic rights are not enjoyed. This background paper limits itself to selected experiences of territorial autonomy within the State.

Territorial autonomy varies from the reservation type, as in the United States of America, some African countries and the Philippines, to comarca in Panama to autonomous regions in a growing number of countries, and to a home rule type, as in the case of Norway and Denmark for the Saami and the Inuit, respectively. But whatever the form, what is essential are the rights that are guaranteed by Constitutions or laws or executive issuance (for example, presidential decree or proclamation) and the structures and processes that facilitate and enable the enjoyment of these rights.

The degree of autonomy of indigenous peoples in relation to the State is influenced to a large extent by fiscal autonomy and the quality of administrative relations between indigenous government and State. But in general, these have not been adequate and effective. An indication of this is the general inability of indigenous peoples to manage their own affairs, particularly if threatened by external economic forces interested in the extraction of natural resources on their ancestral territories. Another is their inability to pursue their own development in a consistent and comprehensive manner. In discussing these points, this paper will focus on the Philippine experience in greater detail. Additional materials from other countries will be cited to give an idea of the available range of experience.

Reservation type 2/

The reservation, one of the earlier forms of territorial autonomy, emerged out of the colonial situation as an administrative measure to control indigenous peoples. The reservation type, therefore, is found in numerous former colonies. Reservations may be created by executive issuances (for example, presidential decree or proclamation). As such, reservations could also be unilaterally eliminated with the consent of indigenous peoples. Reservations generally have no legislative powers and they tend to be merely beneficiaries, of State policies and programmes, if they enjoy any such benefits at all. Ironically, the autonomy of reservations derives from State neglect, in the same manner that village communities attain their autonomy from the sheer inability of the State to serve its entire constituency. But once the reservation is found to have wealth, such as water, forests, minerals, oil and gas, the State intervenes to the disadvantage of the occupants and to the destruction of the environment. Whatever autonomy the reservation has becomes severely undermined as the State intervenes either directly as a development actor (for example, in the construction of dams) or as an agent for big business (as in logging, mining and agri-business).

In the United States of America, a reservation may be created by Congressional action or by treaties. These are meant to guarantee the reservations as Indian homelands. But while treaties between Indian nations and the United States of America are considered treaties between sovereign entities, the governing powers of the Indian nations are restricted by the United States Federal Government and the various local government units to which the reservation belong. Even the traditional powers of the indigenous council of chiefs have been usurped by State-organized tribal councils. The net result is that the reservations are only partially self-governing, if at all. The tribal councils become mere implementors of State or federal policies. Worse, the United States Congress could amend or repeal specific treaty provisions without the consent of the Indian nations.

Since the 1960s the United States Government has been saying that it is United States policy to support steps towards Indian nations' self-determination and self-sufficiency. During the term of President Ronald Reagan, federal funding for Indian nations was cut off and the private sector was encouraged to become involved in Indian development. However, the private sector was more interested in the extraction of natural wealth found in the reservations than in the building of infrastructure and other improvements needed by the reservations. What bears watching is the ongoing Self-Governance Demonstration Project, which could pave the way for each of the 10 participating nations to negotiate with the United States Government for a self-governance compact.

The Philippine experience with reservations has not been any better than that of the United States of America, in spite of United States colonial efforts to learn from the United States experience. Of the several reservations established by the United States colonial administration for what it called "non-Christian tribes", only a few survive to this day. These are occupied by a small number of indigenous cultural communities, often in competition with lowland Christianized Filipino migrants. In many cases, the reservations have been encroached upon by logging, mining and ranching concessions without lasting benefit at all to the indigenous cultural communitites. The Philippines Government, by Executive issuances, can unilaterally reduce the area of reservations, or cancel them without the consent of the affected groups.

Present-day efforts at reservations have not benefited from earlier efforts. In Africa, reservations (which include national parks and reserves for both wildlife and indigenous peoples) have been called by critics "human zoos". They are essentially isolationist and they preclude the development which many indigenous peoples desire.

While there may be possibilities for some kind of economic self-determination in reservations, the reservation as a form of territorial autonomy needs to be thoroughly investigated for appropriate action in cases where it may provide a viable short-term alternative.

One possible direction for transforming reservations into autonomous territorial units would be to convert them into local government units within large autonomous units. This would be some kind of "autonomy within autonomy". It would be desirable where there are several ethnolinguistic groups within an autonomous region making uniform policies extremely difficult.

Home rule 3/

Theoretically, home rule as a devolution of power from a central Government or authority to a dependent political unit can be withdrawn unilaterally by the central Government. It could be a useful administrative device for addressing short-term problems while working out long-term solutions that could lead to full self-governance or full independence for indigenous peoples.

In 1979, Greenland started its Home Rule or national self-government. By this is meant that the Danish Government transferred political authority and responsibility to the Greenlanders (Danes and Inuit). The Greenlandic Parliament has legislative and executive powers affecting the economy, taxation, education and cultural and political affairs. It has jurisdiction over the fishing industry, retail trade, construction and housing, transport and telecommunications. It has veto power on the use of non-renewable resources. Denmark, however, retains (as of 1987) jurisdiction over foreign relations and monetary policy.

In 1988, the Danish and the Greenlandic Parliaments signed a new agreement on mineral resources, oil and gas. The agreement stipulated that all revenues from these resources would be shared equally between them. Revenues beyond 500 million Danish kroner ($US 75 million) would be shared, subject to negotiation between the two parties. In 1989, 10 years after the start of Greenlandic Home Rule, the Greenlanders already controlled all matters concerning land use and the economy, political affairs, education and culture.

In Norway, the Saami Parliament has been established, and the Saami have thus been recognized as a people. Just like the Saami Parliament of Finland, the Saami Parliament of Norway deals with all matters affecting the lives of the Saami people. But the Saami Parliament of Norway is only an advisory body (as of 1987). It is expected to become a decision-making body in the future.

It should not be assumed automatically and uncritically that Home Rule is not without serious problems. Already, there appears to be uneven development taking place in Greenland, with the centre developing faster than the countryside. This is, of course, a worldwide occurrence, but the problem must be a concern of development administration even at the early stage of Home Rule.

The comarca of Panama 4/

The comarca as a concept aims to guarantee the right to self-determination of the Indians of Panama. This would be achieved through the recognition of land rights, through socio-economic development and the preservation of cultural heritage, and through internal administration by the Indians themselves following their own traditions. There is, however, no adequate protection of their rights to natural resources and they have no control over subsurface wealth.

As a territory, comarca refers to areas inhabited by indigenous peoples. To the Indians, a comarca is a "homeland with semi-autonomous political organization under the jurisdiction of the federal Government". The comarcas are already delimited on paper but most of them remain to be demarcated on the ground. Comarcás are governed by their carte organica (organic charter) subject to the Constitution of Panama. The Panama Constitution recognizes the right of indigenous peoples to participate in the national political system. It also provides reserves of land for their survival and economic well-being. The organic charter formalizes the cacique-congreso political system as the indigenous form of government. This ranked political organization is composed of chiefs (cacique) who represent the comarca communities in the democratic congresses.

The State retains control over the administrative district. The establishment of a comarca has to be approved by the national legislature. The organic charter, after having been agreed upon by the government ministries and the comarca leadership has to be approved by executive decree. As local government, the comarca is supervised by a national ministry, the Ministerio de Gobierno y Justicia through the Oficina de Asuntos Indigenos. The indigenous peoples have full voting rights. They have their own representatives in the national assembly and the national legislature.

The comarca judicial system resembles the federal judicial system but is run by the indigenous peoples themselves. For major crimes, however, the comarca laws yield to the federal laws. When unauthorized outsiders encroach upon the comarca territories, the central Government will support the indigenous peoples in their claims over the comarca.

The comarca economy depends on agriculture, tourism and tourism-related activities such as handicrafts. It is able to support the indigenous communities and even contribute to the State. The comarcas may welcome national and international development programmes in accordance with guidelines in the national law, as well as in the organic charter.

As of 1989, problems identified are mostly administrative. The demarcation of boundaries has not yet been completed, resulting in some boundary conflicts with outsiders. A more rational land-use plan needs to be put in place to take into account population growth and appropriate technological inputs to improve the productivity of comarca economies. Human resource development and appropriate training and education need to be undertaken to enable the comarca leaders and administrators to deal effectively with the ever-increasing complexity of national and international realities.

The Brazilian experience

The 1988 Constitution of Brazil contains provisions granting fundamental rights to the indigenous peoples of Brazil. These rights are granted to individuals, tribes and communities, but not to territories as autonomous political units. Referred to earlier as "forest dwellers", the indigenous peoples of Brazil are now referred to in the new Constitution as Indians,

communities and indigenous peoples. They would have liked to be called Nations. In any case, the Constitution now recognizes "the Indians' social organizations, customs, languages, beliefs and traditions, as well as their original rights over the lands they have traditionally occupied" (chapter VIII, art. 268). They have permanent possession of their lands and have exclusive usufruct over the soil, river and lake resources on them (chapter VIII, art. 269). Use of the lands for production is according to customs and traditions (chapter VIII, art. 269 (2)). It is the State's responsibility to demarcate, protect and ensure respect for property on Indian lands (chapter VIII, art. 268).

The same article provides, however, that the use of water resources, including hydroelectricity, and the research and mining of minerals on Indian lands need the authorization of the National Congress, which shall consult the affected communities who shall then be assured of the benefits according to law. Unless the proper mechanisms to ensure lasting community benefits are assured, this may be interpreted as a limitation on self-governance.

Other areas needing Congressional approval are: (i) displacement or removal of groups from Indian lands for whatever reason; and (ii) economic, social and military investment on Indian lands.

To resolve conflict and defend their rights and interests, the Indians, their communities and organizations are legitimate parties and can take legal action; the Public Minister will mediate in all stages of the case (chapter VIII, art. 270). Indeed, judicial defence of the interests and rights of the indigenous populations are institutional functions of the Public Ministry (chapter VIII, art. 232). Article 131 provides that the federal judges are to preside over and judge disputes concerning indigenous rights. Legislation over indigenous populations, however, is the exclusive right of the State (art. 23).

While there have been clear advances in the area of Indian rights in Brazil, the legislative and judicial powers of the State remain practically intact. These are serious limitations on the self-governance of Brazilian Indians.

Regional autonomy

Regional autonomy has been one of the responses of States to the increasing demand of indigenous peoples for self-determination. As an administrative device, it is intended to meet the economic, political and cultural demands of indigenous peoples within the framework of the territorial integrity and the Constitution of the country. Short of being an independent State, the autonomous region, in theory, would have vast legislative, executive and judicial powers. For these reasons, it has been used as a device to counteract separatist tendencies, especially of highly marginalized groups within a multi-ethnic nation-State. It enables Governments to keep their national territories intact.

In relation to the concerns of this background paper, I shall focus on the Philippines for the simple reason of availability of materials. Materials on European experiences, as well as those in other regions, do not offer much detail beyond the general Constitutional provisions, such as adequate representation of all indigenous communities in the various organs of power and adequate taxation powers within the region in accordance with the law. Such is the case with the Autonomy Law of Nicaragua and, with some variations, that of China.

Autonomous Region in Muslim Mindanao, Philippines

The 1987 Philippine Constitution provides that there shall be autonomous regions in Muslim Mindanao in the Southern Philippines, and in the Cordilleras of Northern Philippines. 5/ This was a response to the demand for regional autonomy by groups from the two regions (although in the case of the Moro National Liberation Front in Muslim Mindanao, the initial demand was for secession, and only later for regional autonomy).

The organic laws to govern the autonomous regions were decided by a plebiscite (held in 1989 for Muslim Mindanao and in 1990 for the Cordilleras). Unfortunately, for various reasons, the peoples of the Cordilleras, except those of one province (Ifugao), rejected the Organic Act. Since only one province approved it, the Supreme Court decided that no autonomous region could be established in the Cordilleras, in accordance with the Constitution.

Jurisdiction and powers of government

In the case of Muslim Mindanao, only four provinces of the expected 13 provinces and none of the 10 cities ratified the Organic Act. These are predominantly populated by Muslims, with Christians and one indigenous cultural community (Tiruray) in the minority.

According to the Constitution, the autonomous region shall have the following: (i) a regional executive body; (ii) a regional legislative assembly; and (iii) special courts with personal, family and property law jurisdiction. Maintenance of peace and order shall be the responsibility of the local police agencies; defence and security of the region shall be the responsibility of the national Government (art. X, section 21).

The autonomous region has jurisdiction over the following (art. V, section 2 of the Organic Act):

(a) administrative organization; (b) creation of sources or revenues; (c) ancestral domain and natural resources; (d) personal, family and property relations; (e) regional, urban and rural planning development; (f) economic, social and tourism development; (g) educational policies; (h) preservation and development of the cultural heritage; (i) powers, functions and responsibilities now being exercised by the departments of the national Government, except: (i) foreign affairs; (ii) national defence and security; (iii) postal service; (iv) coinage, and fiscal and monetary policies; (v) administration of justice; (vi) quarantine; (vii) customs and tariff;

(viii) citizenship; (ix) naturalization, immigration and deportation; (x) foreign trade; (xi) maritime, land and air transportation and communications that affect areas outside the autonomous region; and (xii) patents, trademarks, tradenames, and copyrights; (xiii) such other matters as may be authorized by law for the promotion of the general welfare of the region.

Directly affecting the indigenous cultural community is the provision on ancestral domain and lands:

> "Protection of the ancestral domain and lands subject to the Constitution and national policies; the ancestral domain includes all lands and natural resources in the autonomous regions that have been possessed or occupied by the indigenous cultural community since time immemorial, except when prevented by war, force majeure, or other forms of forcible usurpation; it includes pasture lands, worship areas, burial grounds, forests and fields, mineral resources, except strategic minerals such as uranium, coal petroleum, and other fossil fuels, mineral oils, and all sources of potential energy: lakes, rivers and lagoons; and national reserves and marine parks, as well as forest and watershed reservations; lands in the actual, open, notorious, and uninterrupted possession and occupation by an indigenous cultural community for at least thirty (30) years are ancestral lands." (art. XI, section 1)

Resource management and conflict resolution

What laws govern the use and management of ancestral domains and lands? What happens in case of disputes? What administrative mechanisms help to ensure cooperation between the autonomous region and national Government. The Organic Act provides:

(a) The customary laws, traditions, and practices of indigenous cultural communities on land claims and ownership and settlement of disputes shall be implemented and enforced (art. XI, section 4);

(b) The Regional Government shall require corporations, companies and other entities within the ancestral domain ... whose operations adversely affect the ecological balance to take the necessary preventive measures and safeguards (art. XI, section 5);

(c) Lands of the ancestral domain titled to or owned by an indigenous cultural community shall not be disposed of to non-members, unless authorized by the Regional Assembly (art. XI, section 6);

(d) No portion of the ancestral domain shall be open to resettlement by non-members of the indigenous cultural communities (art. XI, section 7).

As a whole, the Regional Government is responsible for the exploration, utilization and development of the natural resources (except so-called strategic minerals, potential energy sources, etc.) of the Autonomous Region, subject to the Constitution and national laws (art. XIII, section 22).

Permits, licence, franchise or concession for the use of natural resources within the ancestral domain shall be approved by the regional Assembly after consultations with the affected indigenous cultural community (art. XIII, section 2).

As additional mechanisms for strengthening the judicial system of the indigenous cultural community, the Organic Act provides for the creation of a system of tribal courts, which may include a tribal Appellate Court. These courts shall determine, settle and decide controversies and enforce decisions involving personal, family and property rights in accordance with the tribal codes of the indigenous community (art. IX, section 14). Indigenous and customary laws shall be codified and compiled (art. IX, section 16).

In the application and interpretation of laws, resolution of conflict will be guided by the following:

(a) The Tribal Code shall apply only to the members of the indigenous cultural community and the Muslim Code only to Muslims (art. IX, section 17 (1));

(b) In case of conflict between the Muslim Code and the Tribal Code, the national law shall apply (art. IX, section 17 (2));

(c) In case of conflict between the Muslim Code or the Tribal Code, on the one hand, and the national law on the other, the latter shall prevail (art. IX, section 17 (3)).

The Autonomous Region shall have a Regional Governor and a Vice Regional Governor directly elected by the people. The Regional Governor shall be assisted by a nine-member Cabinet, at least four of whom shall come from indigenous cultural communities. The members of the Cabinet shall, as far as practicable, come from the various constituent units of the Autonomous Region (art. X, sections 1 and 2).

Through the Regional Governor, the President of the Philippines exercises general supervision over the Regional Government including the local governments, to ensure that national and regional laws are faithfully executed (art. VI, section 1). Furthermore, the Regional Government maintains close coordination with the national Government in the management of the special courts (art. VI, section 2).

The Regional Government shall devolve regional powers to the local governments where appropriate (art. III, section 3). The Regional Governor exercises general supervision over the local governments. He has control of all the regional executive commissions, boards, bureaux and offices, whose appointments are vested in him (art. VIII, sections 17 and 18).

Fiscal autonomy

With these administrative mechanisms for responsibility-sharing, conflict-resolution, cooperation and consultation in place, there is a need for fiscal autonomy to ensure the viability of the Autonomous Region, in

general, and the indigenous cultural community, in particular. Experiences with decentralization and regionalization show that local governments remain largely dependent on the central or national Government for financial needs. Recognizing this, the Organic Act devotes an entire article (art. X) to fiscal autonomy, guided by the State policy of ensuring the autonomy of local governments (art. II, section 25 of the Philippine Constitution).

The Organic Act provides the Autonomous Region with the power to create its own sources of revenue and to levy taxes, fees and charges. Income taxation, however, is the responsibility of the national Government.

Revenue-sharing shall be guided by article X, section 5, which deserves quoting extensively:

> "The total collections of a province or city from national internal revenue taxes, fees and charges, and taxes imposed on natural resources, shall be distributed as follows:
>
> (a) thirty per cent (30%) to the province or city;
> (b) thirty per cent (30%) to the Regional Government; and
> (c) forty per cent (40%) to the National Government.
>
> "The thirty per cent (30%) share of the province shall be distributed equally as follows: ten per cent (10%) to the province, ten per cent (10%) to the municipality, and ten per cent (10%) to the barangay [the smallest political administrative unit].
>
> "The thirty per cent (30%) share of the city shall be distributed as follows: twenty per cent (20%) to the city and ten per cent (10%) to the barangay.
>
> "The province or city concerned shall automatically retain its share and remit the seventy per cent (70%) to the Regional Government, which shall, after deduction of its share, remit the balance to the National Government on a monthly basis.
>
> "The Regional Government shall be responsible for the remittance procedures within the Autonomous Region and the Department of Finance for remittances in the National Government.
>
> "The Organic Act empowers the Regional Government, either by regional legislation or by executive agreement, to evolve a system of economic agreements and trade compacts to generate block grants for regional investments and improvements for regional economic structures. The Regional Planning and Development Board of the Regional Government shall assist the local government units in their need for counterpart funds for foreign-assisted projects."

Constitutional support for people's participation

Supportive of all these provisions on fiscal autonomy and administrative relations in the Organic Act are provisions in the Constitution itself, such as the following:

(a) Local governments shall have a just share in the national taxes which shall be automatically released to them (art. X, section 6);

(b) Local governments are entitled to an equitable share in the proceeds of the use and development of the national wealth within their respective areas, to include direct benefits for the inhabitants (art. X, section 7).

In furtherance of democratic values, the Constitution provides that it is State policy to encourage, support and strengthen the active participation by the people in decision-making at all levels of governance and in the various phases of development (art. II, section 23).

It is also State policy to recognize and promote the rights of indigenous cultural communities within the framework of national unity and development (art. II, section 22).

Local government units (including the Autonomous Region), various public sectors (including indigenous cultural communities), and public agencies shall be consulted in economic development planning (art. IX, section 9).

The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means (art. XII, section 15).

People's participation at all levels of social, political and economic decision-making shall be facilitated, by law, through the establishment of adequate consultation mechanisms. This right to participate shall not be abridged (art. XII, section 16).

Legislative bodies of local governments shall have sectoral representatives (including the indigenous cultural communities) (art. X, section 9).

The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions, and shall consider these rights in the formulation of national plans and policies (art. XIV, section 7).

The Congress may create a consultative body to advise the President [of the Philippines] on policies affecting indigenous cultural communities, with the majority of the members coming from such communities (art. XVI, section 12).

All told, it may be said that there are enough provisions in the 1987 Philippine Constitution and the Organic Act of the Autonomous Region in Muslim Mindanao to meet the requirements of self-governance and self-sufficiency. But a number of key provisions are watered down by the Constitution itself (which is understandable within the framework of a unitary State) as well as by national law and national policies. Such limiting provisions have been perceived by critics as an infringement on the right of self-determination of indigenous peoples.

It may be argued that the Organic Act itself as a national law (since it is enacted by the National Congress), could provide adequate support for more thorough-going self-governance in the Autonomous Region. Unfortunately, in the Philippines experience, as elsewhere, the draft organic acts (of both the Cordilleras and Muslim Mindanao), already flawed from the beginning, were further weakened by the subjection of numerous provisions to national laws and policies. The limitation on the use of strategic minerals and energy sources by the Autonomous Region is an outstanding example. This was expected from the character of the Philippine Congress, which, for cultural, political and economic reasons, was not predisposed to granting thorough-going autonomy to the indigenous cultural communities. 6/ The challenge remains for indigenous peoples and their support groups to continue pressing their demands for the unequivocal recognition of the right to self-determination of indigenous cultural communities.

Self-governance for the majority of the indigenous peoples of the Philippines

The challenge to continue the struggle for self-governance is especially urgent for the vast majority of the indigenous peoples of the Philippines. They are estimated to number about 6 or 7 million (excluding the Muslims) or at least 10 per cent of the entire Philippine population. In the Autonomous Region in Muslim Mindanao, the only sizeable indigenous cultural community is the Tiruray, who numbered 34,341 in 1975 (the last official census year), based on mother tongue or first language spoken. They will exercise autonomy within the Autonomous Region.

While there is a Cordillera Administrative Region (CAR) in name, it is only an administrative unit created by an Executive Order in 1987. It was meant to provide a transition to an autonomous region with full powers provided for by an Organic Act, in accordance with the Philippine Constitution. Partly because CAR was meant to be merely transitory and partly because it was intended as a counter-insurgency measure, it is a highly watered-down version of regional autonomy. Its key officials are appointed by the President of the Philippines. CAR is to coordinate the planning and implementation of programmes and services in the region. It coordinates with national Government in the supervision of field offices of the various government departments and in the identification, planning and acceptance of projects and activities in the region.

CAR has no taxation powers, other than those already granted by the national Government to local governments. The Executive Order, however, specifies that at least 50 per cent of the revenues generated in the region should be left with CAR and the local governments in the region. CAR has no legislative powers, although it can promulgate and implement needed rules and regulations.

Interestingly enough, part of its scope of authority is the "development of indigenous laws and political institutions, particularly those of direct democracy and collective leadership, as well as the promotion of indigenous institutions and processes for conflict resolution and dispute settlement". In effect, therefore, despite the intent of the Constitution to encourage

local autonomy (Autonomous Region being one form), there is no real self-governance for the vast majority of indigenous cultural communities.

It is true that there are two agencies (created in 1987 by an Executive Order) mandated to "preserve and develop the culture, traditions, institutions and well-being ... of the cultural communities in conformity with the country's laws and in consonance with national unity and development." These two agencies (the Office of Northern Cultural Communities for those north of Manila and the Office of Southern Cultural Communities south of Manila) are not explicitly mandated to empower the indigenous cultural communities for self-governance. Thus far, they have concentrated on livelihood projects, legal services, organizing of tribal councils, etc. There is no sustained programme for the recognition of the right to ancestral domain and yet land problems have always been identified by various groups and by Government itself as the central issue affecting indigenous cultural communities. In this connection, there is a bill pending in the House of Representatives of the Philippine Congress to create a Commission on Ancestral Domain which will be responsible for settling the age-old claims of the indigenous cultural communities to their ancestral domain and lands. With the next general elections already preoccupying the minds and time of Congressional leaders, the probability of the bill becoming law is nil.

In view of the failure of the national Government to carry out faithfully the Constitutional mandate for the recognition of the various rights of the indigenous peoples, those who have organized themselves have firmed up their resolve to continue their struggle for self-determination. For now, this has taken the form of regional autonomy for the peoples of the Cordillera and recognition of ancestral rights for the other groups. The organized groups, notably the Cordillera People's Alliance, the Lumad-Mindanao, and the Katipunan ng mga Kabutubong Mamamayan ng Pilipinas (National Alliance of Indigenous Filipinos) continue to launch educational campaigns on the conditions and aspirations of the indigenous peoples, to organize more groups and to mobilize them to address a wider range of concerns such as health, environment, cooperatives, appropriate technology, human rights, agro-forestry, land problems, etc., intended to strengthen their capability to govern their communities and take control of their lives. 7/

Concluding remarks

History tells us that international human rights standards, Constitutions and statutes, organic laws or charters, do not by themselves guarantee the enjoyment of human rights. In the end, the aspirations for territorial autonomy, sovereignty and democratic rights, equity and social justice, cultural freedom and integrity (and let me add the currently fashionable buzzword, sustainable development), can be realized only by persistent concerted efforts of all concerned groups - indigenous peoples, support groups, and enlightened officials throughout the world and all educational institutions.

For fiscal autonomy, which is required by the everyday concerns of administering programmes and projects emanating from Constitutions and statutes governing autonomous regions, the various indigenous communities need

to organize and consolidate themselves for effective and efficient action. Owing to the multiplicity of forces, often with diverse and opposing interests, there will always be organizational and administrative problems. The search for an enduring basis of consensus has to proceed. Divisive and obstructive factors need to be identified and remedied immediately in as democratic a manner as possible.

Where there is no effective indigenous representation in the organs of power and in the administrative machinery, it is important to obtain the cooperation of enlightened and sympathetic non-indigenous officials. It has been observed (in Brazil, Australia, the Philippines, Argentina, in Europe and elsewhere) that where there are enlightened and sympathetic non-indigenous officials in the central Government, the general cause of democratization is advanced. For one thing, bureaucracy may be easier to mobilize for the delivery of goods and services, including the planning and management of development specifically addressed to the indigenous peoples. Educational institutions and the mass media should be mobilized to educate government officials, decision makers, opinion makers and the public about the conditions and the rights of indigenous peoples. Appropriate training in administrative skills to complement indigenous institutions has to be undertaken.

Ultimately, however, fiscal autonomy and self-governance are best served by the direct participation of the indigenous peoples in the development process and in their actual involvement in self-governance. These could be achieved both in the formal structures of government and in community associations, including a broad range of mechanisms for popular participation. The international solidarity network needs to be expanded and consolidated to help create a global political, economic and cultural climate favourable to the enjoyment of human rights in general and of indigenous peoples' rights in particular. All these human organizations, after all, are responsible for translating the spirit and the letter of Constitutions and statutes into food and medicines, clothing and shelter, dances and songs, prayers and rituals, and all other things that make human rights real in the everyday life of indigenous peoples.

Notes

1/ Cf. Raul P. de Guzman, and Danilo R. Reyes. "Public administration and the agenda of change", in Raul P. de Guzman et al (eds.), Public Administration in a Changing National and International Environment, Manila: Europa Secretariat General 1989 and George K. Najjar, "Development Administration and 'New' Public Administration: A Convergence of Perspectives", Public Administration Review 34(6) (1974), pp. 534-537.

2/ On United States reservations, see IWGIA (International Work Group for Indigenous Affairs), Newsletter No. 33 (1983), pp. 115-116; IWGIA Yearbook 1989, pp. 50-59; IWGIA Document No. 62 (December 1988/January 1989); IWGIA Document No. 68 (1991). On the Philippines, see Clavel, Leothiny S. They Are Also Filipinos: Ten Years With the Cultural Minorities. Manila/Bureau of Printing; 1969. On Africa see Robert K. Hitchcock, "Foragers on the Move".

Cultural Survival Quarterly 9(1) (1985) pp. 31-36; Toby Alice Volkman, "The hunter-gatherer myth in southern Africa", Cultural Survival Quarterly 10(2) (1986) pp. 25-32; Robert K. Hitchcock, "Hunters and herding: Local level livestock development among Kalahari San", Cultural Survival Quarterly 11(1) (1987) pp. 27-30.

3/ For a general comment on home rule see John J. Schrems, Principles of Politics, Prentice-Hall, Englewood Cliffs, New Jersey, 1986, p. 253. On Greenland, see IWGIA Newsletter No. 51/52 (October-December 1987), pp. 41-44; IWGIA Yearbook 1988, p. 57; IWGIA Yearbook 1989, pp. 39-41.

4/ See Peter H. Herlihy, "Panama's quiet revolution: Comarca homelands and Indian rights", Cultural Survival Quarterly 13(3) (1989) pp. 17-24, see "Indian Rights in the New Brazilian Constitution", Cultural Survival Quarterly 13(1) (1989) pp. 6-12; Marcio Santilli, "Notes on the constitutional rights of the Brazilian Indians", Cultural Survival Quarterly 13(1) (1989) pp. 13-15; Elizabeth Allen, "Brazil: Indians and the new Constitution"; Third World Quarterly 11(4) (1989) pp. 148-165.

6/ The Constitutional Commission which drafted the 1987 Philippines Constitution did not provide for territorial autonomy for other indigenous cultural communities since they were not as organized as the Cordillera and the Muslim groups and occupied areas which were not contiguous. As understood in the academic literature and by the Constitutional Commission, indigenous cultural communities refer to those who were not Islamized and Christianized and have retained much of their pre-Islam and pre-Western culture.

7/ Ponciano L. Bennagen, "State policies and indigenous peoples of the Philippines", paper prepared for the UNESCO Division of Human Rights and Peace, Paris, 1989. This sentiment has also been expressed by others, Marcio Santilli, op. cit., p. 15; IWGIA Document No. 62 (1989), p. 101; Baguio Cordillera Post, 9 October 1988, p. 5.

9/ Cordillera Resource Center, "What is genuine regional autonomy?" Cordillera Papers Monograph No. 1. Baguio City/Cordillera Resource Center, 1989.

Effective means of planning for and implementing autonomy, including negotiated constitutional arrangements and involving both territorial and personal autonomy

Background paper prepared
by Lars Adam Rehof

1. Delimitation of the topic

Legal and practical aspects of setting up autonomy arrangements for indigenous populations have gained increasing practical importance in the last few decades.

In the present context, "autonomy" is understood to mean a legal regime, whereby (revocable or irrevocable) powers of self-government, including legislative competence, concerning one or more specified areas - within the overall constitutional make-up of the State in question - are conferred on a distinct group of individuals (defined by their ethnic origin, and/or language, etc.).

The powers conferred may be restricted to certain or all aspects of personal jurisdiction or may be extended to territorial jurisdiction. 1/ This paper will touch upon experiences covering both personal and territorial application of self-government.

By definition, self-government will have to take place within the constitutional framework of a particular State, be it a unitary State or a confederation. Whether the system of self-government rests on the Constitution itself or on a statutory basis of a subsidiary nature may entail important theoretical and practical consequences, for example, in relation to the question of fundamental rights of indigenous populations and of the (ir)revocability of the autonomy arrangement.

In international diplomatic discussions one will often find the term indigenous "populations" and not "peoples". 2/ This may be taken to indicate that some State representatives primarily see the question of indigenous groups as situations which may resemble that of ethnic and other minorities 3/ within States and not as self-determination of peoples and, thereby, not entailing the establishment of new States. 4/ In the present context situations where the right of self-determination of indigenous peoples may be pertinent will not be dealt with. 5/

One has to recognize, however, that it may be very difficult to determine the precise border line between the application of article 1, paragraph 1, of the International Covenant on Civil and Political Rights and article 27 of that Covenant, on minorities. In many situations there will be a grey zone between the right to self-determination at the one end of a continuum and the rights of minorities at the other end. The paper will take its point of departure in the situation described in article 27 of the International Covenant on Civil and Political Rights.

Note: The opinions expressed in this paper are those of the author.

Two defining characteristics of the term "indigenous" may be identified, one legal and one socio-economic. First, the term "indigenous" points to the fact that the populations/peoples in question are primarily characterized by their long-standing ("Since time immemorial") connection with a specific territory, which later in time has been taken over or at least cohabited by other population groups. Second, the original inhabitants will often find themselves in a position of legal and/or de facto subordination or domination and economic deprivation. They suffer from lower living standards than the rest of the population, which may in itself raise an issue under the International Covenant on Economic, Social and Cultural Rights. In order to remedy this situation, the original inhabitants may frequently try to claim "historic rights" in political and legal forums of the State in question or bring the claims to the international arena.

Claims to historic rights are often claims to, inter alia, constitutional recognition (if not full self-determination as a nation and subsequently as a full-fledged State), self-government, land rights, natural resource rights and language rights.

2. The international legal framework

Members of indigenous populations are, as any other individual, protected by applicable global or regional human rights conventions such as the International Covenant on Civil and Political Rights and, in large parts of Europe, the European Convention on Human Rights and Fundamental Freedoms. 6/ Most major human rights conventions contain provisions prohibiting discrimination against individuals on the basis of their ethnic origin. But this negative statement of equality may not prove sufficient.

2.1. Minorities

The question of the rights and protection of indigenous peoples is closely related to the legal status of minorities. As stated above, indigenous people often constitute a minority in a particular State, but may enjoy special minority rights or demand special protection. 7/ Numerically inferior indigenous populations may be classified as a "qualified minority".

Much time and effort has been spent on defining a minority. 8/ It has not been possible to obtain international consensus on a comprehensive definition, both for conceptual and, more importantly, for overriding political reasons. 9/

One recent development in a regional, quasi-legal context is the Concluding Document of the Copenhagen CSCE/CHD meeting (Copenhagen, June 1990), in which the term "national minority" is accepted. 10/ In the Charter of Paris for a New Europe, which was adopted by the Heads of State or Government of the participating States of the Conference on Security and Cooperation in Europe (Paris, November 1990), it is confirmed that "the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created". 11/ At the same time it was decided to convene a meeting of experts on national minorities in 1991. 12/ In the Concluding Document of the Moscow meeting, held in September-October 1991, no significant further development was recorded.

2.2. Article 27 of the International Covenant on Civil and Political Rights

The most important legally binding human rights provision for the time being is probably article 27 of the International Covenant on Civil and Political Rights. This provision has to be seen in the light of other provisions in the same Covenant and in the context of other Conventions, especially the International Covenant on Economic, Social and Cultural Rights and International Labour Organisation Convention 169.

Article 27 is concerned with minorities characterized by their ethnic origin, religion or language. The main thrust of the provision is to ensure that State authorities do not interfere with the daily life of the minority (protection against State measures). Article 27 guarantees that the minority in question has a right to maintain its own culture, exercise religious practices and use its own language within the minority population, without outside interference.

The existence of a minority is often easily verified when it comes to indigenous populations, but may be more difficult in other instances. 13/ The real acceptance and formal recognition of a minority by State authorities may, however, be difficult to obtain in both cases.

The travaux preparatoires of article 27 demonstrate that the question of positive measures was discussed in some detail during the negotiations on the actual wording of article 27. 14/ The prevailing opinion in the Human Rights Commission at that time was that no obligation to provide positive measures, such as building and maintaining special schools for minority children, existed. Article 27 recognizes, however, that it may be relevant to give minorities preferential treatment.

It must be admitted that the scope of article 27, as conceived, is somewhat limited. The main function of the provision is primarily to act as a barrier to undue State interference with the "internal life" of the particular minority. 15/ The subsequent jurisprudence from the United Nations Human Rights Commitee has not meant a fundamental break away from the original intentions of the States parties. 16/ In the cases of Kitok v. Sweden 17/ and Ominayak/Lubicon Lake Band v. Canada, 18/ the Human Rights Committee has, however, introduced an interpretation of the concept of "culture" in article 27 which implies an extension of this concept to cover traditional economic activities.

Article 27 can be said to cater for certain classical human rights problems. Solutions to the specific problems of indigenous populations cannot, however, be said to be exhausted with the adoption of this provision. Subsequent experience and ensuing legal developments bear testimony to that.

The wish to reconcile majority and minority rights may present difficult questions of how to strike a fair balance between the two. This balancing act is particularly painful in areas where the clash takes place between human rights of the same legal standing (i.e. rights which can be weighed against each other on the same level). 19/ Conflicts between majority and minority population groups often raise issues of this kind and present a unique challenge to democratic societies. The most difficult area, from a theoretical

point of view, is perhaps voting rights. In a democracy it is axiomatic that every citizen has an equal right to influence the composition of the legislature. If indigenous peoples are in the minority, they may claim certain prerogatives in order to remedy past (and present) disadvantages. Such prerogatives easily militate against fundamental democratic principles. Respect for the formal rules of democracy may make it difficult to rectify past injustices committed under undemocratic circumstances.

Land rights and claims to redistribution of land very often raise complex questions. The livelihood of members of both the minority and the majority may depend on such disputes. Should historic rights prevail or should consideration for each individual citizen prevail (which may mean that historic rights are not given priority or that they only lead to some kind of compensation)? In any case it may be very dangerous to leave the solution to be found on an ad hoc basis before individual courts of law.

As stated above, in democratic societies all citizens, indigenous as well as late coming immigrants, are - at least in a number of situations and for a number of purposes - (meant to be) equal in law and fact. This also means that general international human rights provisions should apply to indigenous peoples' communities. 20/ Special protection may not degenerate into unwarranted privileges. The risk of this happening on a general scale for the time being is, however, minimal.

As the "cold war" in human rights, at least in an East-West perspective, may by now have subsided somewhat, it is time for the United Nations to move on. One initial step could be the amendment of the International Covenant on Civil and Political Rights so as to include a specific provision on indigenous peoples' rights.

2.3. International Labour Organisation Conventions

Neither the Universal Declaration of Human Rights, the Covenants, nor the International Convention on the Elimination of All Forms of Racial Discrimination refer specifically to indigneous populations. The same is also true of the European and American human rights instruments. The International Labour Organisation (ILO) was an exception to this trend. The adoption of ILO Convention No. 169, which is a partial revision of ILO Convention No. 107, is a step forward for indigenous peoples and populations. 21/

The development of the term "indigenous" started with ILO Convention No. 107, article 1 (1) (b), which defines indigenous populations as people who descend "from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong". This definition stressed the historic relationship between the indigenous people and the inhabited land.

In 1971, the Economic and Social Council, by resolution 1589 (L), authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) to undertake a study of the problem of

discrimination against indigenous populations. The Sub-Commission appointed José R. Martínez Cobo to prepare the study. In his study 22/ he defined indigenous populations as follows:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."

The study by Martínez Cobo signified a change by which the original idea of assimilation of indigenous populations, which found expression also in ILO Convention No. 107, was transformed into the concept of self-definition or self-identification as a fundamental criterion for determining the groups to which rules of indigenous populations apply. 23/ Martínez Cobo stated, inter alia, that on an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

ILO Convention No. 169 adopts, in article 1 (b), the following definition of indigenous peoples, which stresses the political status of the indigenous people in question. These are regarded as "indigenous peoples" on account of "their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions". This definition produced considerable controversy. It was argued that the text used terms which did not reflect international law. Several governmental representatives expressed definite preference for the word "populations" rather than "peoples". 24/ The adoption of the text was made possible by adding paragraph 3, which states:

> "The use of term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." 25/

ILO Convention No. 169 emphasizes the rights of indigenous peoples to exercise control over their own institutions, ways of life and economic development, and to maintain and develop their identities, languages and religions, within the framework of the States in which they live (Preamble, para. 6).

It is significant that ILO Convention No. 107 was never ratified by more than a few States, and it can be expected that the rate of ratification of ILO Convention No. 169 may also be low. Several countries in all parts of the world seem to experience great problems in recognizing and guaranteeing the rights of indigenous populations.

2.4. Subsequent developments

Independent of the developments with regard to the ILO Conventions, the Sub-Commission decided to establish the Working Group on Indigenous Populations in order to develop standards concerning the rights of indigenous populations and peoples. As Chairman-Rapporteur, Mrs. Erica-Irene A. Daes prepared a draft declaration on the rights of indigenous peoples. 26/

The idea underlying the endeavours to have a declaration adopted is the belief that group protection and autonomy in the political sphere can best be attained by providing special rights and other measures. This approach to the concerns of indigenous peoples can already be found in the International Convention on the Elimination of All Forms of Racial Discrimination.

In the draft universal declaration on the rights of indigenous peoples, prepared by the Working Group on Indigenous Populations, 27/ it is stated in part V, paragraph 23, that they have the right "to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions". In paragraph 24 it is furthermore declared that indigenous peoples have "the right to decide upon the structures of their autonomous institutions", including determination of the membership, and States have the "duty ... to recognize such institutions ... through the legal systems and political institutions of the State". 28/

It may be worthwhile considering whether the aspirations voiced in these draft provisions are reflected in any existing legal arrangements. As far as the present author is aware, only very few States have implemented measures as wide-ranging as described in these provisions.

The so-called "Home Rule" arrangement for Greenland may be offered as an example of a fairly comprehensive implementation of the requirements mentioned. 29/ A short look at the legal framework of the Greenland Home Rule may thus be warranted (see Infra, item 3.2.).

2.5. Individual and collective rights

In recent years many debates have centred on the inadequacy of human rights coined in individual terms. The historic origin and the classical tradition emphasize the rights and freedoms of the individual against the State. This is still highly relevant in modern democracies. The notion of self-determination implies some kind of collective decision-making process which has given rise to the concept of collective rights. The analysis of the exact legal content of the notion of collective rights has not progressed very far. Is it merely a "pooling" of individual rights or is it a genuine, self-contained right?

It is important that more effort is devoted to this exercise inasmuch as the notion of collective rights in recent times has been abused, with detrimental effects, to legitimize and emphasize the duties of the individual to the State and/or the governing authorities.

2.6. The legal-political process of internationalization and the impact of the nation-State

The present decade is probably going to be one of the most decisive periods of the century. Momentous changes in the international power structure and the rise of democracy in the northern hemisphere are some of the key elements. At the same time an unprecedented scale of global economic (and ensuing political) integration is taking place. In Europe this is most clearly seen in the possible development of monetary and economic union and possibly even political union within the European Community.

The integration process presupposes a reduction of State sovereignty and corresponding transferral of powers to supra-national or federal authorities and thereby, at least potentially, reduces the participating States to self-governing territories. At the same time, in Eastern Europe, a process of decolonization and the exercise of self-determination is taking place, resulting in the genesis of new States or redesign of existing States.

This dual-track development, at least in Europe, makes it much more difficult to talk about minority questions inasmuch as some (Western European) States may now become minority self-governing territories within a European federal structure. Some of the smaller European Community States with an indigenous language of their own (for example, Denmark and the Netherlands) may find themselves in a situation where minority protection and minority rights are called for in the long run.

Another feature which deserves mention is the changing legal position of the individual in public international law. The obvious need for international cooperation in different areas, such as law enforcement, and the growing realization that human rights concerns cannot be left to the individual State leads to a growing pressure for recognition of the individual as a subject of public international law. This development towards recognition of the individual on the international plane and access to humanitarian intervention is reflected in the tenth preambular paragraph and paragraph 17.2 of the Concluding Document of the recent Moscow meeting of the Conference on Security and Cooperation in Europe.

These different and to a certain extent parallel and interdependent developments (international integration, building of federal structures, growing exercise of self-determination, the rise of democracy and the strengthening of the international legal position of the individual) will no doubt have an impact on the political and legal possibilities of indigenous peoples.

3. State implementation of self-government or more restrictive arrangements

3.1. The legal foundation: a typology

A survey of existing arrangements of self-government shows that they rest on different legal foundations. A list can be established of different types of relationships, ranging from full independence with special ties between the States (a "Commonwealth" type) to non-acceptance of any distinct status for the indigenous people.

It is important to stress that the following list does not necessarily entail a qualification of the genuineness of the degree of self-government obtained under the different arrangements. In some States a statutory arrangement may ensure a higher degree of real self-government than a constitutional arrangement in other States and vice versa.

The list of different legal modi vivendi between the State and the indigenous people could be construed as follows:

1. Independence of the indigenous people (a State-to-State relationship, perhaps with special ties such as trade arrangements);

2. Treaty relationship (a State-to-quasi-State relationship, e.g. the New Zealand Waitangi Treaty);

3. Constitutional recognition of distinct status (e.g. Norway);

4. Statutory arrangement of a more or less irrevocable nature (e.g. Greenland);

5. Other de facto arrangements; and

6. Non-recognition of a distinct status.

Different instances of types 3 and 4 will be touched upon below. It is important to bear in mind that the political processes underlying legal recognition of different degrees are dynamic. Thus, some of the present arrangements may "move up on the list" in the course of time, while others will have found (or will have been put to) rest in a specific type of relationship.

3.2. The Greenland Home Rule Act

The Greenland Home Rule Act (Danish Parliamentary Act No. 577 of 29 November 1978) is an example of a self-government system which goes comparatively far in the direction of real self-government within a unitary State system. As can be seen from the Act, the Home Rule system does not mean a disruption of the territorial and legal unity of the Kingdom of Denmark. 30/ The Greenland Home Rule arrangement forms part of a historic tradition in which the independence of Iceland from Denmark in 1948 and the passing of the Home Rule Act for the Faeroe Islands in 1948 (Act No. 137 of 23 March 1948) are the main elements.

3.2.1. The international legal status of Greenland

It is stated in section 1 (1) of the Act that Greenland is "a distinct community within the Kingdom of Denmark. Within the framework of the unity of the Realm, the Greenland home rule authorities shall conduct Greenland affairs in accordance with the provisions laid down in this Act". This provision is to a certain extent modelled in accordance with the wording of the Faeroe Islands Home Rule Act.

Although Greenland, according to the Home Rule Act, on the one hand is a "distinct community" within the Kingdom of Denmark, this wording on the other hand emphasizes that the Greenland community is not like any other local community (for example, municipal council) in Denmark. It is a community with special features and with its own rights and obligations, including legislative powers.

At the same time this phrasing also makes it quite clear that the Greenland Home Rule Government is not a State Government, it is a Government with powers delegated by the legislators of the Kingdom of Denmark. 31/ The Home Rule Government is vested with further reaching powers than a municipal authority, but is not - as a Danish municipal authority is - constitutionally protected against repeal of the Home Rule Act as such.

Within the overall constitutional framework the law makers have, however, found a compromise between strict adherence to the constitutional principles of a unitary State and more pragmatic considerations. These pragmatic considerations have resulted in some very interesting delegation of powers to the Home Rule Government. A system which may set a precedent for future developments in other parts of the world.

As seen from the point of view of the Home Rule Act, Greenland does not possess a separate legal personality in public international law. Greenland is, from this point of view, not able to enter into treaty obligations on her own. But in practice this formal point of view is slowly being changed.

3.2.2. Foreign policy and treaty making powers

In section 10, paragraph 1, of the Act it is stipulated that "the home rule authorities shall be subject to such obligations arising out of treaties and other international rules as at any time are binding on the Realm". Furthermore, in section 13 it is stated that "treaties which require the assent of the Folketing and which particularly affect Greenland interests shall be referred to the home rule authorities for their comments before they are concluded".

And finally in section 16, paragraph 1, it is emphasized that "the home rule authorities may demand that in countries in which Greenland has special commercial interests Danish diplomatic missions employ officers specifically to attend to such interests", and in paragraph 2 it is furthermore laid down that "the central authorities may after negotiation with the home rule authorities empower the home rule authorities to advance special Greenland interests by taking part in international negotiations of special importance for Greenland's commercial life".

To this is added in paragraph 3 that "where matters of particular interest to Greenland are at issue, the central authorities may on a request by the home rule authorities authorize them to negotiate directly, with the cooperation of the Foreign Service, provided such negotiation is not considered incompatible with the unity of the Realm".

It is, for instance, sometimes the case that representatives of the Greenland Home Rule Government travel abroad and negotiate fisheries agreements with States. Representatives have travelled to the USSR and Canada for discussions on fisheries.

A very special situation arose when Greenland decided to leave the European Community (EC) with effect from 1985. 32/ During the negotiations on the secession of Greenland from the EC, Denmark and Greenland were in a way represented on both sides of the table inasmuch as Greenland and Danish representatives were negotiating with the EC Commission and at the same time the Danish Government was sitting as a member of the EC Commission's delegation and thereby also representing Greenland interests on the EC Commission side. This instance provides another example of the proven flexibility of the Greenland-Danish relationship.

Recently it has been reported in the media that the Greenland Home Rule Government has suggested to the Danish State Government that there should be a distinct Greenland representation on different Danish delegations abroad, for example, the Danish delegation to the annual session of the United Nations General Assembly. This wish by the Greenland Home Rule Authority has met with preliminary approval from the Foreign Minister. 33/

The Home Rule Act delegates many other powers to the Home Rule Government. 34/ Parts of the list of areas transferred to the Greenland Home Rule Government may give an impression of the scale. As of May 1979: the Greenland Home Rule administration and the management of the municipalities. By the end of 1980: taxes, schools, social services, the church, training of teachers and social workers, radio and television, library system, labour exchange, management of foreign workers, management of commercial fisheries and hunting. By 1981: training in business studies, social assistance to Greenlanders in Denmark, conservation, planning, museums. By 1982: certain labour market regulations. By 1984: names of places in Greenland. By 1985: Royal Greenland Trading Company, financial support to the industry, the Greenland flag, further labour market regulations. By 1986: management of imports, air traffic, competition regulation. By 1987: The Greenland Technical Organization, import of oil, electricity supply, water management, heating, telegraph and telephone communications. By 1989: management of non-commercial hunting and fishing. By 1991: further labour market regulations and management of certain airports. By 1992: the health service.

As is apparent from this list of the mandates handed over, the powers delegated include many, if not most, of the areas which are subjects of special rights of indigenous peoples. The list probably extends somewhat further than is required in the draft declaration mentioned above under item 2.4. One important area not handed over yet is law enforcement, prisons and the judiciary. The judiciary and the law enforcement system is still integrated into a uniform Danish legal system. 35/ This area, of course, presents some specific problems. Nevertheless, should the Home Rule Government want it, this area also should be mandated to the Home Rule. This, however, will require a change in the present legislation.

3.2.3. Natural resources

As regards the right to make use of natural resources, section 8 of the Act contains rather equivocal language. It is stated in section 8, paragraph 1, that "the resident population of Greenland has fundamental rights to the natural resources of Greenland". 36/ This wording apparently means that the right of the Greenland population to the natural resources is a question of fundamental law, i.e. a question which may not be altered (restricted) by statutory regulation or even constitutional amendments.

However, in the same section it is stated (para. 2) that "prospecting and the exploitation of these resources are to be regulated by agreement between the Government and the Landsstyre". In paragraph 3 a kind of veto right is guaranteed so that the Greenland authorities may in fact block any attempt at the use of natural resources in Greenland, but the interesting thing is that the Greenland authorities cannot themselves make any positive decision as to the use of natural resources without prior agreement with the State Government.

So when it is stated above that section 8 represents a strange kind of compromise between, on the one hand, saying that the rights of the Greenland population are fundamental and, on the other hand, saying that the Danish Government should have a decisive word in the decision-making process, it is also indicated that the fundamental character of the rights must be seen within certain limitations.

A comparison with the draft declaration indicates that the established system of power sharing in the management of Greenland natural resources probably meets the requirements in the draft declaration to a large extent.

3.2.4. Gradual implementation of the transferral of areas of competence

An important element of the Home Rule Act is that it envisages the transferral of all powers, except certain State functions such as foreign policy, treaty making power and defence, to the Home Rule Government. Today there is no doubt that the State Government wants the Home Rule Government to take over and administer as many areas as possible.

One of the reasons for the relative success of the Home Rule system is probably this gradual process of transferral of responsibility, which has been conducted in an atmosphere of good faith. This has made it possible for the Home Rule Government to build up expertise and the necessary administrative structures, although it is still heavily dependent on the recruitment of civil servants from Denmark. Soon the Home Rule Government will be capable of taking over all the responsibilities originally envisaged. Only the constant strains on the Greenland economy may put limits on further new legal and political developments in this process.

3.2.5. Assessment of the Home Rule arrangement and possible independence of Greenland

Greenland is still very dependent on economic support from the Danish State. Naturally, this economic dependence creates a certain disequilibrium in the relationship. Research has shown that much, if not most, of the financial aid to Greenland actually returns to Denmark, inasmuch as the money is spent on goods and services from Denmark.

The Danish State and the Danish people no doubt feel some kind of historical responsibility for the evolution and fate of Greenland. This will most likely guarantee a reasonable degree of financial assistance for a long time to come.

One basic and peculiar aspect is the fact that Denmark and Greenland are geographically divided. This fact may have been a contributing factor to the demonstrated willingness to implement a fairly comprehensive Home Rule system. 37/ In those States where it is more difficult to distinguish the relevant territories, the legal and practical problems may increase accordingly. This may especially be the case in States where the immigrant population is scattered all over, including areas of indigenous habitation.

Could Greenland become an independent State if she so wished? In the present stage of the relationship this may only be of academic interest. The question of formal independence for Greenland has, however, recently been clarified in a statement by the Danish Prime Minister, delivered at a Nordic Council meeting on 26 February 1991. In his statement, the Danish Premier recognized the right of the Greenlanders and the Faeroese to opt for (full) independence, should this be clearly expressed by the Greenland and Faeroe Islands populations.

Consideration of the risks to the natural environment has meant that mining and other exploitation of minerals has been kept at a very low level. It also means that the economic interests of the Danish State and of the Danish private sector in Greenland are rather limited. To this must be added that Greenland probably no longer "enjoys" the same strategic interest from a Danish State and NATO defence point of view. These and other factors may mean that Greenland, from a purely political point of view, would be able to become an independent State if the Greenland population made a firm commitment to that cause. It is, however, perhaps more fruitful for Greenland to be dependent on a small far-away State like Denmark than on some of the bigger immediate neighbours. To this must be added that the EC may like to keep Greenland within the EC sphere of interest, primarily because of the potential occurrence of huge living and non-living natural resources.

The final evaluation of the Greenland-Denmark relationship and Home Rule can, of course, only be undertaken by the Greenlanders themselves. From an outsider's point of view it seems that Home Rule has worked according to plan and that its implementation has been smooth, especially when compared to the awesome dimensions of the task.

The Home Rule Act thus seems to be able to serve as an example for other home rule arrangements.

3.3. Existing or proposed indigenous advisory councils in Norway and Sweden

It may be interesting to look at the experience of other Nordic countries. 38/ One may, however, object that the total number of people affected by the different legal arrangements in the Nordic area is comparatively small. All in all, not more than 100,000 indigenous people in Greenland, Norway and Sweden can be said to be affected by these arrangements. This figure, of course, has to be seen in comparison with the overall estimated figure of indigenous populations (including tribal people) worldwide, which is put at 300 million. The majority of them live in Asia and the Americas, and only some in the Polar region and northern Europe.

3.3.1. The Norwegian arrangement

In Norway a limited system of advisory powers has evolved in the Sami areas within the last century, although it is probably fair to say that legal recognition of the Sami people has come later than more practical initiatives to support education and culture. 39/

In 1987 the Norwegian Parliament adopted Act No. 56 of 12 June 1987 on the establishment of the Sami Advisory Body (Sameting) and other Sami legal questions. 40/ It is stated in the introductory article of the Act (art. 1, para. 1) that the purpose of the Act is to build a framework for the Sami population group ("folkegruppe") in Norway in order that this population group may secure and develop its language, its culture, and its social life ("samfunnsliv"). In article 2 of the Act the Sami Advisory Body is given powers of general consultation. The Sameting may on its own initiative raise any question of interest to the Sami population. The Sameting, however, may not take any decisions binding on Norwegian citizens unless specifically authorized in the Act or any other enabling statutory provision.

Furthermore, it is stated that Norwegian State authorities should refrain from taking any decisions concerning Sami matters without having first consulted the Sami Advisory Body. In article 2, paragraph 13 it is stated that both the Sami and the Norwegian languages may be used at meetings in the Sameting. The Act entered into force on 24 February 1989.

As can be seen from this brief survey of the Act, it provides a very broad framework for further developments in the relationship between the Norwegian State and the Sami population. It is noteworthy that the Sameting has not been vested with legislative powers even though it has the general capacity to raise any matter of interest to the Sami population.

In early 1988 the Norwegian parliament adopted a resolution to include a new article 110a in the Constitution, with the following wording:

"Article 110a.

It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture, and way of life." 41/

This provision is in line with the special measures approach taken by existing international instruments, and may set an interesting example for other States.

In Norway there is an ongoing discussion on Sami rights on, for instance, the right to administer natural resources in Sami settlement areas and on the continuing implementation of equality of the Sami language and the Norwegian language.

In April 1991 the Norwegian Government published a report on transferral of tasks and authority to the Sameting. 42/ In the report it is suggested that the consultative status of the Sameting should be strengthened and that a number of different administrative matters should be transferred to and managed by the Sameting. The Report suggests, inter alia, that the management of financial support to Sami cultural and educational activities, reindeer herding, etc. should be managed by the Sami.

3.3.2. The proposed Swedish arrangement

In 1983 the Swedish Government decided to establish a committee to look into the Sami population's situation in Sweden. This Committee has, up to 1990, published four reports: on the status of the Sami people in public international law (SOU 1986:36), on Sami law and the Sami advisory body (SOU 1989:41), on change of language and the preservation of language (SOU 1990:84) and a report on Sami law and the Sami language (SOU 1990:91). The last report was presented to the Council of State and the Under-Secretary for Legal Affairs in November 1990.

In the report it is recommended that the special status of the Sami as an ethnic minority and an indigenous people in Sweden be codified in the Constitution Act. It is furthermore recommended that a special Act on Sami conditions be adopted which will include provisions concerning the promotion of Sami culture and social life, above all through the establishment of a Sami Advisory Body (Sameting) elected by the Sami people themselves. The tasks of the Sameting should be to work for the preservation and development of the culture and social life of the Sami people, including decision-making power on the distribution of State grants and of moneys from the Sami Fund to Sami culture and Sami organizations, the right to take part in community planning, ensuring that the interests of reindeer herding are allowed for in connection with the exploitation of land and water, dissemination of information on Sami conditions and the position of the Sami in Swedish society, the promotion of Sami culture and cooperation with other authorities and community bodies and right of returning official statements on matters affecting Sami interests.

From this it will be seen that the proposed Sameting is not a full-fledged parliament, but is first and foremost a consultative body with certain powers of allocation of economic means. The Committee recounted in one of the reports (SOU 1989:41, p 71) that "the Sameting would acquire the status of an obligatory advisory body. Given the special expert knowledge which the Sameting will possess of matters relating to reindeer herding, its views will carry a great deal of weight in the processing of permit applications".

One of the major problems in connection with the living conditions of the Sami people is, of course, the exploitation of natural resources, including reindeer herding, the preservation of the forest, and other uses of land and water. The Committee recommended that it be made clear in the Reindeer Herding Act that the reindeer herding rights of the Sami are based on immemorial prescription, that all Sami enjoy the right of reindeer herding, and that the right of reindeer herding is a special right attaching to real property. The Committee also suggested special consultation procedures for new projects on large-scale forestry. Finally it was suggested that the coordination of Sami affairs within the Cabinet Office be established on a more permanent basis. A special coordinating secretary for Sami affairs should be considered.

In the last report (SOU 1990:91), on Sami rights and the Sami language, it is recommended (p. 23) that "the use of Sami be allowed in dealings with certain national authorities concerned with Sami affairs". These authorities include certain administrative boards and the National board of Agriculture. Furthermore, it is recommended "that the right to use Sami in dealings with national municipal authorities be made applicable to both verbal proceedings and correspondence. For practical reasons, however, the possibility of using Sami in verbal proceedings is restricted to visits to local government offices by Sami speakers and to telephone communication". 43/

4. Present status of self-government arrangements in the Nordic area

Of the three different existing and proposed legal arrangements described above, the Greenland arrangement seems to be by far the most comprehensive, including delegated legislative and executive powers. In other parts of the world similar arrangements may be in existence, but for present purposes it will be assumed that the Greenland case may be taken as an example of an advanced stage of self-government.

The Greenland system is, however, a mandate system. The Home Rule Act may, at least in principle, be repealed by the Danish Parliament. This is probably not a real political option any more. Nevertheless, the status of Greenland as a distinct community should be constitutionally recognized.

The existing or proposed Sameting in Norway and Sweden are primarily vested with advisory or consultative powers. It has to be acknowledged that the Sameting are not legislatures. However, a great deal is being done in areas such as access to education, the promotion of Sami cultural life and protection of the reindeer. Steps are being taken to facilitate equality of language as regards communication with public authorities.

The question of constitutional recognition of the special position of the Sami population is under discussion. As regards preservation of the forest and exploitation of natural resources, it seems that the State Governments still want a decisive influence. Thus, more could be done to restore self-administration, if not full-fledged self-government, in the Nordic Sami areas.

5. Suggestions for further action

Building on some of the experiences described above, one may be able to point to some priorities for future action.

I. It seems very important that genuine political will to implement home rule arrangements in good faith is present.

II. Constitutional obstacles to home rule are mainly technical obstacles. They can be solved, if real political will exists. Indigenous communities should be recognized as distinct communities within the State structure.

III. Home rule arrangements may be a confidence-building measure which ensures, rather than destroys, the unity of States. These arrangements contribute to reducing tensions and keep the international community at ease.

IV. Transferral of powers should be done in an orderly manner. Preparation for the task is vital. For States acting in good faith it is important to demonstrate that home rule is a functioning alternative to more restrictive "solutions". The political organization of the indigenous people should be encouraged as a preparative step to home rule. Training of future civil servants and managers should be undertaken in order to facilitate gradual acceptance of responsibility.

V. Economic assistance from the State to the home rule, at least in a transitory phase, is crucial. A long-term commitment of some kind will also be necessary.

VI. Indigenous home rule arrangements are not exempt from general human rights obligations. Special protection does not warrant human rights violations. Within the home rule a fair balance must be struck.

VII. The powers mandated should be as broad as possible within the State structure. The criteria should be: what is best solved at the local level and what meets the particular interests and needs of the indigenous population? In order to obtain a real level of self-administration, if not full-fledged home rule, it is important that indigenous people are "taught" to administer themselves. They can only learn to become working democracies by being allowed to practise democracy, by being able to legislate for themselves and to enforce their own rules. The indigenous language must be recognized.

VIII. Indigenous peoples recognized as distinct communities, preferably on a constitutional level, may derive benefits from staying within a State structure. Mutual interests may exist (economic, defence, etc.). Compromise as to the exploitation of natural resources (e.g. mutual consultation with veto powers), with due consideration of the environmental impact, may be the price to be paid in real politics, if this approach is adopted.

IX. The International Covenant on Civil and Political Rights should be amended so as to include a specific provision on indigenous peoples' rights and special measures to rectify past injustice.

X. The question of indigenous peoples should be placed permanently on the agenda of the United Nations with a view to further institutional development.

XI. Codification of customary law and studies on the relationship between customary legal systems in indigenous societies and statutory and international legal arrangements should be undertaken in order to facilitate recognition of indigenous legal solutions and a harmonious development between the different legal systems.

Notes

1/ Full jurisdiction will normally encompass powers to legislate and enforce rules.

2/ Article 1 of the United Nations Charter and articles 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights speak explicitly about self-determination of "peoples" and not "populations". The term "population" may be understood as a broader term, including the notion of "peoples" (aspiring to become States) and other distinct ethnic groups (preferring to opt for home rule arrangements).

3/ As mentioned below, indigenous peoples can only to a certain degree be characterized as minorities. In fact, indigenous people often constitute a minority in the particular State. But indigenous people are often not a "normal" minority inasmuch as they have a special historic relationship with the country (land, landscape, etc.) in which they live and thereby claim special rights.

4/ The Sub-Commission has, however, in 1988 decided henceforth to use the term "peoples", which may also, depending on the circumstances, cover the notion of "population". This change of terms is not formally reflected in the title of the working group, i.e. the Working Group on Indigenous Populations. In this context the term peoples will be used without any prejudice to the status in public international law.

5/ On self-determination of peoples, see generally United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples, 1541 (XV) concerning information under Article 73 (e) of the Charter of the United Nations, and 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. In the Principles and Elements on Self-Government adopted by the Inuit Circumpolar Conference, an indigenous NGO, the question of self-government is viewed as one suboption within the overal framework of self-determination. According to this view, this means that self-government cannot replace self-determination, but may be a temporary or permanent manifestation of self-determination as long as this is the wish of the particular indigenous people.

6/ From a numerical point of view only a few indigenous peoples are protected by the European Convention on Human Rights and Fundamental Freedoms. Many more are covered by the American human rights system. Indigenous people in Asia, certain parts of Eastern Europe and the Pacific are not covered by regional human rights instruments.

7/ It should, however, be noted that the different application of minority definitions may lead to strongly varying results. In some instances the indigenous people from a numerical point of view is in the majority, but this may not be officially recognized in the public census. Sometimes an indigenous people may be a minority - as seen as a proportion of the overall population - and sometimes the minority indigenous people may be an overwhelming majority in the geographical area of the State in which they live.

8/ See, for example, the report of the Special Rapporteur, F. Caportorti, United Nations document E/CN.4/Sub.2/383/Rev.1, para. 568, in which it is proposed that the term "minority" may be taken to refer to: a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

9/ Political considerations may often carry more weight than purely conceptual reasons, cf. the reservation of the Republic of France to article 27 of the International Covenant on Civil and Political Rights, the effect of which is that article 27 is not applicable to France. See the decision of the United Nations Human Rights Committee in Communication No. 220/1987, T.K. v. France. The French Government does not recognize the existence of minorities, even though vocal groups like the Bretons and Basques often claim minority status. The strange thing is that the French Government apparently recognizes the existence of minorities in other States.

10/ Cf. Conference on the Human Dimension, Document of the Copenhagen meeting, Chapter IV. The term "national minority" is somewhat strange inasmuch as nation refers to ethnic and other groupings which are not necessarily confined within one State. Minority problems very often arise from the fact that there is no exact equation between State and nation. A State may consist of several nations, one or more of which may want to form new States (and thereby being able to shred the minority status). If this is accepted, one should prefer the term "State minority" rather than "national minority". On the political implications of "national minority" reference is made to Christian Tomuschat, in Festschrift für Hermann Mosler, Berlin 1983, pp. 959 f. In United Nations phraseology the term "national minority" has long been accepted, cf. e.g. The Genocide Convention which speaks of "national group" and the 1960 UNESCO Convention on Discrimination in Education, article 5, para. 1 (c).

11/ Charter of Paris, p. 17.

12/ The meeting was held in Geneva from 1 to 19 July 1991. Reportedly the meeting was not very productive because of the tense political situation in Yugoslavia and the USSR obtaining at the time. In particular because one of the main problems is precisely the very sensitive question of minority rights, self-government and self-determination. Thus, some States (both from Western and Eastern Europe) are very reluctant to advance the issue of minority rights in the prevailing political circumstances and some States are most likely worried about a "spill-over" effect from the disintegration of certain Eastern European States.

13/ It is thus generally assumed that immigrants, refugees and others may not invoke CCPR article 27. Manfred Nowak criticizes this assumption in his CCPR-Kommentar, Kehl 1989, p. 523.

14/ Cf. the discussions in the Human Rights Commission in 1952-53, United Nations document A/2929, Chapter VI, and the deliberations in the Third Committee in 1961, document A/5000, paras. 120-123 and document A/C.3/SR.1103.

15/ By "undue" is meant, inter alia, discriminatory or disproportional State interference.

16/ For example, Sandra Lovelace v. Canada (Communication No. 24/1977).

17/ Application No. 197/1985.

18/ Application No. 167/1984.

19/ If the rights involved are not on the same level, there will be no need to strike a balance inasmuch as the more fundamental right should prevail.

20/ In certain indigenous societies sex discrimination is rampant. The fact that it happens in an indigenous society is, of course, no justification.

21/ General reference is made to Natan Lerner, Group Rights and Discrimination in International Law, Dordrecht, 1991, p. 99 ff.

22/ Study of the problem of discrimination against indigenous populations, United Nations document E/CN.4/Sub.2/1986/7/Add.1-4. See for a short survey Fact Sheet No. 9 from the United Nations Centre for Human Rights, Geneva 1990. The Study was reportedly prepared with very substantial assistance from Augusto Willemsen Diaz.

23/ This concept of self-identification is reflected in the Norwegian Act of Parliament No. 56 of 12 June 1987 on the Establishment of a Sami Parliament (primarily vested with advisory powers), article 2 (6), in which conditions for membership of the electorate are defined thus: those entitled to register are those who "regard themselves as Sami" and who use Sami as their home language or have a parent or grandparent who does or has done so. See for a smiliar proposal the Swedish Government Report SOU 1989:14 on Sami Law and the Sami Parliament, p. 67.

24/ Cf. Natan Lerner, op. cit., p. 102.

25/ For a similar conflict, see chapter IV, paragraph 37, of the Document of the Copenhagen CSCE/CHD meeting, in which it is stated that none of the "commitments" undertaken on protection of minorities "may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations ... including the principle of the territorial integrity of States".

26/ For a survey of its development, see Gudmunder Alfredsson in a contribution to the 7th Council of Europe Colloquy on equality and non-discrimination, 1990, published as Council of Europe document H/Coll (90)6, Strasbourg 1990.

27/ Cf. United Nations document E/CN.4/Sub.2/1991/40, annex II, p. 35. The Declaration, if adopted by the United Nations General Assembly, will not constitute a legally binding instrument.

28/ Natan Lerner, op. cit., p. 104, makes the following comments on an earlier draft: "The suggested principles did not incorporate controversial claims advanced by indigneous groups, such as the right to self-determination; the exclusion of jurisdiction asserted by States over indigenous nations or peoples, except in accordance with their freely expressed wishes; the right to permanent control and enjoyment of historical territories; and the right to restitution of lands. Some indigneous organizations based their claims on the ground that discovery, conquest, or settlement, and unilateral legislation 'are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples'."

29/ Autonomy arrangements may be found elsewhere, e.g. in Spain. In this context, however, only examples from the Nordic countries are touched upon.

30/ A Danish colony since 1721, Greenland became an equal, integral but distinct part of the Danish Kingdom in 1953. Article 1 of the Danish Constitution of 1953 provides that the Danish Realm consists of Denmark, Greenland and the Faeroe Islands. The introduction of this provision in the Constitution and the general applicability of the Constitution to Greenland, including most of the provisions on civil and political rights, enabled the Danish Government to have Greenland removed from the list of colonies (non-self governing territories) according to Article 73 of the Charter of the United Nations. For a critical review of the relationship between Greenland and Denmark and comments on the decolonization process, see Gudmundur Alfredsson, in German Yearbook of International Law 1982, pp. 190 ff. For an early general assessment of the Home Rule arrangement, see Isi Foighel (Chairman of the Home Rule Commission which prepared the Home Rule Bill), Home Rule in Greenland. Meddelelser om Grønland. No. 1. Copenhagen 1980, also reproduced as Appendix I to United Nations document CERD/C/106/Add.9, and the same in Common Market Law Review 1980, pp. 91 ff. The Home Rule Commission Report is published in 4 volumes (in Danish) as Betankning 837/1978.

31/ The relationship with the State Government has changed formally within the past few years. The Home Rule Government demanded that the Ministry for Greenland (which was a relic from the colonial period) should be closed down. The State Government accepted this and Greenland affairs are now dealt with by the different ministries, coordinated by the Prime Minister's Office. The Home Rule arrangements is part of the Prime Minister's portfolio.

32/ Cf. Hjalte Rasmussen (ed.), Greenland in the Process of Leaving the European Communities, Copenhagen 1983. In law, Greenland was not capable of leaving the EC. What happened was that the geographical application of the EC treaties was restricted to certain parts of the Kingdom of Denmark (originally excluding the Faeroe Islands and subsequently Greenland), cf. article 227 of the EEC Treaty. Denmark on behalf of Greenland has negotiated an association agreement with the EC in accordance with articles 131-136a of the EEC Treaty.

33/ To this may be added that the Greenland Home Rule Government participated as an observer at the ninth session of the Working Group on Indigenous Populations, Geneva, 1991.

34/ The implementation of the Act in many of the practical areas of administration will be dealt with in a paper by the Home Rule Government to be submitted at the meeting, and will not be touched upon further in this context.

35/ Special regulations apply in Greenland. A tailor-made Greenland Criminal Code, which to a certain extent is a codification of Greenland customary legal traditions, and a special Greenland Administration of Justice Act exist. The criminal justice system is probably somewhat more liberal and flexible than in Denmark. Also the prison system has been adjusted to Greenland local conditions (e.g. more open prisons than in Denmark). It should, however, be noted that certain aspects of the Greenland legal system may raise an issue under articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms. These concerns include, inter alia, the composition and independence of the Greenland Courts and the existing rules on access to prolonged remand in custody without proper judicial review.

36/ "Resident population" must be understood to mean Inuit (Eskimo) and immigrant residents from Denmark.

37/ This does not detract from the fact that many non-self-governing indigenous populations and peoples around the world are in exactly the same geographical position (i.e. island communities).

38/ It should be noted that Finland was the first Nordic State with a Sami population to introduce a Sami advisory body, the Sameting. For an account of recent developments in Finland see United Nations document E/CN.4/Sub.2/AC.4/1991/1 of 5 June 1991. The Aland Islands have since 1922, building on a 1921 recommendation from the League of Nations, enjoyed autonomous status. In February 1991 the Finnish Parliament passed a revised Autonomy Act for the Aland Islands which will enter into force in 1993, see Gunnar Jansson, "Reform of the Autonomy Act of the Aland Islands", in Finnish Features, May 1991, Ministry for Foreign Affairs, Helsinki 1991.

39/ It should be noted that Norway is the first Nordic State to ratify ILO Convention No. 169. For an evaluation of the legal position of the Sami in Norway see Hakon Eriksen, GYIL 1985.163.

40/ The Act was drafted on the basis of a Ministry of Justice Committee report on the legal status of the Sami (NOU 1984:18).

41/ In the 1987 report Individual and Democratic Rights of the Australian Advisory Committee to the Constitutional Commission, Canberra 1987, pp. 74 ff, the Committee likewise supported the insertion within the Constitution of a provision which would confer broad power on the Commonwealth of Australia to enter into a constitutionally based contract with representatives of Aboriginal and Torres Strait Island peoples. This proposal has not been acted upon. Treaties between States and indigenous peoples may entail de facto constitutional recognition. General reference is made to the preliminary report submitted by Miguel Alfonso Martínez, Special Rapporteur, on treaties, agreements and other constructive arrangements between States and indigenous populations, United Nations document E/CN.4/Sub.2/1991/33 of 31 July 1991.

42/ Overføring av oppgaver og myndighet til Sametinget, Tilradning fra en interdepartmental arbeidsgruppe, Kommunaldepartementet, Oslo 1991.

43/ The Swedish ombudsman for questions of ethnic discrimination has criticized the proposals made by the Swedish Government, see Opinions of 20 October 1989 (File No. 367-89), of 19 December 1989 (File No. 547-89) and of 3 June 1991 (File No. 107-91). The ombudsman pointed out, inter alia, that the proposals did not meet the requirements of ILO Convention No. 169.

Home Rule in Greenland

Background paper prepared by
Emil Abelsen

By Danish Act of 29 November 1978, Home Rule was established in Greenland within the unity of the Danish Realm. The Act was prepared by a Danish-Greenlandic Commission, comprising five members elected by the Greenland Provincial Council, the two Greenland Members of Parliament, seven members elected by Parliament and a Chairman appointed by the Minister for Greenland.

The structure of Home Rule in Greenland serves as a unique model for local autonomy. For the Faeroe Islands, Home Rule was introduced in 1948 and the Commission stated that the Faeroese arrangement was undoubtedly in conformity with the 1953 Danish Constitution. Thus the Faeroese arrangement served as a legal model for the Greenland Home Rule Act.

I shall outline:

A. The legal basis of the Greenland Home Rule structure;

B. The scope of Home Rule and the economic principles of the Act;

C. The political aspects of the Act;

D. The provisions of the Act with regard to mineral resources;

E. Greenlandic as the main language.

A. The legal basis of Home Rule

From the outset it was accepted by Danish and Greenlandic members of the Home Rule Commission that the introduction of Home Rule should take place "within the frame of the unity of the Realm" (cf. art. 1 of the Home Rule Act).

This principle is derived from article 1 of the Danish Constitution, and it implies: that sovereignty continues to be exclusively with the authorities of the Realm (the Government and Parliament); that Home Rule in Greenland could not be established through a treaty based on international law, but exclusively on the basis of constitutional law through a Danish act by means of which the Danish Parliament delegated a certain, precisely defined, part of its competence to Home Rule; and that only part of the competence of the authorities of the Realm may be delegated to Home Rule, just as only fields pertaining exclusively to Greenland may come under Home Rule.

Also, the principle of maintaining national unity excludes the formation of a federation.

Note: The opinions expressed in this paper are those of the author.

B. The scope of Home Rule and the economic principles of the Act

1. Home Rule powers

The Home Rule authorities are the popularly elected legislative Greenland Assembly, the "Landsting", and the executive committee, the "Landsstyre". The Home Rule Act does not specify the method of election of the "Landsstyre", nor detailed rules for eligibility to the "Landsstyre", the functioning period nor the possibilities of dismissing the "Landsstyre" or a member of the "Landsstyre". The final decision on these issues is left for Greenland politicians to establish in a Greenland Assembly and Executive Act, and from this basis the Home Rule parliamentarism has grown. In this respect, article 3 of the Home Rule Act is a fairly flexible one.

2. The provisions of Home Rule

The main purpose of Home Rule is to transfer (delegate) legislative and executive powers and consequently responsibility from the Danish political authorities to the Greenland authorities.

The Home Rule Act provides that the Home Rule authorities may request that a number of fields specified in a Schedule annexed to the Act be transferred to Home Rule (cf. art. 4 of the Act). The list of functionally defined transferable fields is not exhaustive; transfer of legislative and executive powers in fields other than those listed is subject to prior agreement between the Home Rule authorities and the national authorities of the Realm (cf. art. 7 of the Act).

During the 12 years that have elapsed since the establishment of Home Rule, the Home Rule authorities have almost exhausted the list in the Schedule, and thus assumed authority in most aspects of life in Greenland. Only the health services remain to be transferred (as of 1 January 1992).

The more important fields in which transfer has taken place include:

The organization of the Home Rule system.

Taxation,

Regulation of trade, fisheries and hunting,

Education,

Supply of commodities,

Transport and communications,

Social security,

Labour affairs,

Housing,

Environmental protection and conservation of nature.

3. Procedures for the transfer of power

The Home Rule Act is based on the principle that legislative power and the power of the purse should not be divided. Consequently, article 4 (2) of the Act provides that the Home Rule authority must assume the inherent expenses of a transferred field. Conversely, the Home Rule authorities is the sole beneficiary of taxes and revenues generated in fields transferred.

Since Greenland self-financing is not yet possible in all capital-intensive fields, an instrument has been created in the Home Rule Act to facilitate transfer of power to Home Rule in fields requiring Danish subsidies (art. 5). The Parliament passes, after consultation with the Home Rule authorities, an enabling act specifying the competence transferred to Home Rule and establishing a framework in the form of a few fundamental principles for each field, while leaving it to the Home Rule authorities to decide the more detailed regulations and undertake the administration of the said field.

The Danish subsidies to the Home Rule authorities are not earmarked for specific purposes but granted as a lump sum, "block grants". Thus, the Home Rule authorities have the freedom to determine the order of priority for expenditure of the funds allocated by the Parliament, while still adhering to the framework of the enabling acts for each field. Subsidies are fixed by Danish acts for three-year periods, and the amount is provided for annually in the Danish budget.

It is an essential principle of the Home Rule system, that the Home Rule authorities is not indirectly governed through considerations of economic support.

Implementing this system presupposes that the transfer of fields leads neither to savings nor to additional expenses for the Danish State.

Danish State subsidies have been based upon expenses which the State has so far incurred for the purposes in question. If the purpose in question has not had the priority with the State that Home Rule authorities would wish to apply to this field, the size of subsidies have been the object of difficult negotiations between Home Rule authorities and the State. I shall return later to the more political aspects of our Home Rule structure.

4. Constitutional limits to Home Rule

I have mentioned, that the constitutional principle of the national unity of the Realm means that certain fields must remain with the authorities of the Realm and cannot be transferred to the Home Rule authorities.

This applies particularly to such fields as:

Constitutional law (including the administration of justice and constitutional rights);

Foreign relations (including treaty-making power);

National finances;

Defence policy;

Fundamental principles regarding the law of persons, family law, inheritance law, and the law of contracts.

The fact that these fields cannot be transferred to the Home Rule authorities does not prevent the adoption of specific provisions by the Danish Parliament, "Acts for Greenland", having due regard to Greenland conditions. A specific example of a Danish Act for Greenland is the criminal code for Greenland, adopted in 1954 long before the introduction of Home Rule. This Act was adopted after an intensive study of Greenland tradition and thinking with regard to punishment and penalty. As a result of this research, this Act has no terminology of isolation, prison, or punishment, but institute sanctions of resocialization, using the term "precautions". At the time of its adoption, this Act was regarded as the most advance criminal code in the world, much in line with new sociological theories in Denmark and Europe. I shall not go into further details here, as I know that a special session of this seminar will deal with this issue.

However, with respect to non-transferable fields, the Home Rule authorities have an important advisory function with the central authorities of the Realm. Proposed legislation exclusively addressing Greenland affairs must be submitted to the Home Rule authorities for comments prior to the introduction of the Act in the Danish Parliament (cf. art. 12 (1) of the Home Rule Act). Where proposed legislation is "of particular importance to Greenland", the Home Rule authorities must be consulted before it is put into effect in Greenland, (cf. art. 12 (3) of the Home Rule Act).

5. Greenland and Danish foreign policy

I have mentioned that treaty-making power is still vested with the national authorities. However, the Home Rule Act has created cooperative procedures serving to accommodate the interests of Greenland and to alleviate potential conflict of interests between Greenland and Denmark in matters of foreign policy by granting the Home Rule authorities a number of important functions of an advisory, representative and executive nature, which I shall mention briefly.

Extensive, legislative and executive powers, territorially as well as functionally defined, have been transferred to Home Rule. Consequently, the cooperation of the Home Rule authorities will often be necessary to fulfil Denmark's international obligations. Accordingly, the Home Rule Act provides that the Danish Government must consult the Home Rule authorities before entering into treaties that particularly affect Greenland interests (cf. art. 13 of the Home Rule Act). This consultative procedure applies whether or not the treaty concerns a transferred field.

As mentioned in the official comments on the Act, it is the practice, and was so for some years before Home Rule, that until such consultation has taken place, a reservation is made with regard to Greenland before entering into or signing the treaty.

Conversely, the Home Rule authorities are under obligation to consult the authorities of the Realm before introducing measures that might prejudice Denmark's interests vis-à-vis other countries, for instance, measures concerning regulation of fisheries (cf. art. 11 (2) of the Home Rule Act).

Let me add here a further cooperative measure which has lately been introduced, showing the flexibility of Danish/Greenlandic relations. With the approval of the Danish authorities a special permanent committee of the Greenland Assembly has been established under the Greenland Assembly Act - the Greenland Assembly Foreign Relations and Security Policy Committee - whose task is to consider and discuss statements and information received from the Premier of the Executive on these issues. In this way the Greenland Assembly has a "parliamentary" control of the Greenland Executive on such issues. The Committee often holds its meetings with the Danish Foreign Minister as its guest, debating foreign relations and security policy matters directly with him.

Further, in accordance with article 16 (3) of the Home Rule Act, the national authorities may, upon request, authorize the Home Rule authorities to conduct, with the assistance of the Foreign Service, international negotiations on purely Greenland affairs. The Home Rule authorities have notably availed themselves of the right to conduct bilateral negotiations in connection with the conclusion of fishery agreements.

C. Political aspects

I have mentioned the basic principle of the Home Rule Act: the unity of the Realm. This also implies a somewhat diffuse assumption of a political-moral nature regarding mutual solidarity between the various parts of the Realm.

From the way that Home Rule has been established, that is:

- prepared in a commission with a political composition,
- the fact that the Greenland population approved by referendum the entering into force of the Home Rule Act,
- the special and unusual preamble to the Home Rule Act, stating the special constitutional position of Greenland within the Realm,

it follows that the Home Rule Act politically and morally is regarded as an agreement that should not be changed by the Danish Parliament without the consent of the Home Rule authorities, even if a unilateral change by an act of the Danish Parliament might in theory be regarded as a possibility. (Article 3 of the Danish Constitution states that legislative power rests jointly with the King (Government) and Parliament, and some have argued that legally King and Parliament have the prerogative of withdrawing the legislative power delegated to the Home Rule authorities.)

Even changes of the Home rule Act that might have the consent of the Home Rule authorities, should be necessitated by strong political motives in the relations between the two parts of the Realm.

No changes have been made so far to the Greenland Home Rule Act of 1978, and this is also the case for Home Rule as established back in 1948 for the Faeroe Islands. It has been possible to solve arising problems by interpreting the Home Rule Act, its spirit and meaning. In this way its character of a constitutional agreement has been respected.

Probably due to the basic principles of the Home Rule Act it has never been necessary either to invoke article 18 of the Act (also to be found in the Faeroese Home Rule Act), regulating the solution of conflicts arising with regard to the division of powers between the Home Rule authorities and the Danish authorities.

The decision-making board consists of political and legal members, weighted in favour of the political elements. It is assumed that the board is competent to take a position only on political conflicts between the Danish Government and the Home Rule authorities which it has not been possible to solve in any other way. The board is not in permanent existence and so far has never functioned.

D. Mineral resources

With regard to mineral resources, a special solution has been found in article 8 of the Home Rule Act.

1. During the work of the Home Rule Commission, the view was expressed from Greenland that sovereignty over mineral resources stemmed from the Greenlandic people's right to self-determination as formulated in the Covenants of Human Rights, article 1, paragraph 2. Some members of the Commission felt that Greenlanders were not a "people" in the legal sense of the Covenants. Others felt that Greenland had already used its right to self-determination in 1953 by opting for Greenland to constitute an integral part of the Realm and emerge from the status of colony.

However, the Commission did not express its view on this matter, but concentrated its deliberations on a practical solution, guided here also by its overall concepts of maintaining the unity of the Realm.

The first paragraph of article 8 of the Act reads: "The resident population of Greenland has fundamental rights to the natural resources of Greenland".

The official comments to the Act characterizes this provision as a political declaration of principle and further states that the recognition of fundamental rights to natural resources of the permanent population stems, above all, from an emotional cohesiveness between a population and the land which it has inhabited for centuries. This cohesiveness naturally leads to demands for certain rights not covered by traditional legal parlance.

2. The following provisions of article 8 dealing with mineral resources (the terminology of the Act is "non-living resources") have been the particular focus of political debates between the Home Rule and the national authorities:

The basic principles of the Home Rule Act's provisions on the mineral resources are:

The principle of equality between the Greenland Home Rule authorities and the national authorities;

Joint decision-making power vested in the national authorities and the Home Rule authorities in regard to major decisions in the area of mineral resources, so that both parties are entitled to oppose a development or concrete resolution, i.e. a mutual right of veto.

These principles have been laid down in article 8, paragraphs 2 and 3:

"(2) To safeguard the rights of the resident population in respect of non-living resources and to protect the interests of the Unity of the Realm, it shall be enacted by statute that preliminary study, prospecting and the exploitation of these resources are to be regulated by agreement between the Government and the Landsstyre.

"(3) Before any agreement under subsection (2) is entered into, any member of the Landsstyre may demand that the matter be laid before the Landsting, which may determine that the Landsstyre may not consent to an agreement of the proposed content."

The official comments to the Act further state that the rights to be taken into account in framing the arrangement on mineral resources are:

A right to a decisive influence in the area of mineral resources, in particular an influence upon the framing of a mineral resources policy and the speed with which it should be implemented;

A right to secure limitation of any possible detrimental influences upon the physical or social environment so that the traditional trades, culture, and way of life of Greenland are preserved;

A right to a dividend from enterprises exploiting natural resources, with a view to the creation of a financial basis for improving living conditions, particularly in the long run.

It is stated that none of these rights are absolute rights in the legal sense, and they must be seen in the light of the constitutional structure desired for the nation and the population, which has been acknowledged by both parties.

The division of income from mineral resource activities is not dealt with directly in the Home Rule Act, but in the Danish Act on mineral resources in Greenland (No. 585 of 29 November 1978, later amended).

In this Act it was stated that public revenue from mineral resources in Greenland should, first of all, be applied for compensating the previous transfer of capital from Denmark to Greenland. Any other additional income should be for the benefit of the nation as a whole as well as for Greenland. Subsequent agreement between the Government and the Home Rule authorities has

led to a 50-50 division of revenue, while division of income beyond 500 million Kroner was to be settled by Danish Act after negotiations between the parties (Amendment to Mineral Resources Act, No. 844, 21 December 1988).

There is a natural desire on the part of the Home Rule authorities to become more independent of subsidies from Denmark, and the income from the exploitation of mineral resources would meet that purpose. It is still to be seen what income is generated by such activities, and the future will show how a greater part of the income for Greenland can be negotiated with the national authorities.

E. The Greenland language

Lastly, may I mention article 9 of the Home Rule Act as being of special relevance in this forum:

"(1) Greenlandic shall be the principal language. Danish must be thoroughly taught.

"(2) Either language may be used for official purposes."

This article means a formal recognition of the Greenland language as the main language of Greenland. The Greenland language is an integral part of the way in which we conceive our own identity. By history and tradition, and Greenland Home Rule being established within the Realm, Danish has become our linguistic link with the world at large. The enormous development in communications in the world will also raise the demand for the teaching of English.

Let me finish by adding that we believe that, by way of Home Rule we have come far on our way to autonomy, and also that we have come futher than is the case for many indigenous people around the world.

We have now had 12 years of experience of Home Rule, and it has been hard labour to create for ourselves our identity as a young democracy. We believe that we have succeeded, and that our Home Rules system deserves the attention of other indigenous peoples or minorities within a State, and is a possible model for Home Rule in other parts of the world.

It is therefore a special pleasure for us to host this meeting.

Thank you.